National Association of Government Employees (International Brotherhood of Police Officers) a/w Service Employees International Union/NAGE/-IBPO, Local 5000 *and* International Union, United Automobile Aerospace, Agricultual & Implement Workers of America (UAW), Local 376. Cases 34–CA–6997, 34–CA–7235(1–3), 34–CA–7240, 34–CA–7471(1–2), 34–CA–7472(1–3), 34–CA–7473, 34–CA–7474, and 34–CA–7524

February 19, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

The issues presented for Board review are whether the judge correctly found that the Respondent committed several violations of Section 8(a)(1), (3), and (5) of the Act.[1] Another issue concerns the judge's recommendation that the Respondent's president, Kenneth Lyons, be censured for comments made in a posthearing letter he sent to the judge. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions, except as modified below, and to adopt the recommended Order.

With minor exceptions,[4] we agree with the judge's analysis of the unfair labor practice issues. We disagree, however, with his recommendation that the Board formally and severely censure Kenneth Lyons, the Respondent's president, for statements made in a posthearing, September 27, 1996 letter that Lyons sent to the judge. In that letter, Lyons made various accusations about and critical characterizations of counsel for the General Counsel and the Board's Regional Office. These statements were opprobrious and inappropriate, but we find that the judge's recommendation of censure is too severe in the circumstances of this case. We note in particular that there is no evidence of prior misconduct by Lyons in connection with Board proceedings. We therefore find it appropriate to warn Lyons and the Respondent that future similar conduct by the Respondent's president as a representative of his union before the Board could be referred to the General Counsel for disciplinary proceedings.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, National Association of Government Employees (International Brotherhood of Police Officers) a/w Service Employees International Union/NAGE/IBPO, Local 5000, Cromwell, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Thomas E. Quigley, Esq., for the General Counsel.
Edward F. O'Donnell, Jr., Esq. and *Peter A. Janus, Esq. (Siegel, O'Connor, Schiff & Zangari, P.C.),* of Hartford, Connectcut, for the Respondent.
Thomas W. Meiklejohn, Esq. (Livingston, Adler, Pudla & Meiklejohn), of Hartford, Connecticut, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges filed[1] in the above-entitled cases by International Union, Automobile Aerospace, Agricultural & Implement Workers of America (UAW) Local 376 (the Charging Party, the Union, or the UAW, Region 34 issued several complaints, culminating in an order consolidating cases, consolidated complaint and notice of hearing, and an order further consolidating cases, both issued on May 24, 1996. These documents allege that National Association of Government Employees (International Brotherhood of Police Officers) a/w Service Employees International Union/NAGE/IBPO/SEIU, Local 5000 (Respondent or NAGE) violated Section 8(a)(1), (3), and (5) of the Act.

The trial with respect to the allegations raised by the pleadings was held before me on June 18, 19, 20, and 21, 1996, in Hartford, Connecticut. Briefs have been filed by all parties and have been carefully considered.[2]

[1] On June 3, 1997, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

[2] We also reaffirm the Executive Secretary's denial of the Respondent's motion for special permission to appeal the Associate Chief Administrative Law Judge's Order granting the Charging Party's petition to revoke subpoena.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find without merit the Respondent's allegations of bias on the part of the judge. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence.

[4] In adopting the conclusion that the discharge of Robert Cerritelli violated Sec. 8(a)(3) and (1), we find no need to rely on the judge's statement that evidence uncovered by the Respondent's discriminatory investigation cannot be used by the Respondent to justify the discharge. We agree with the judge, however, that the discriminatory nature of the investigation supports finding that the Respondent's reasons for discharging Cerritelli were pretextual. We also emphasize that the voucher problems of other discharged employees were more egregious and that, unlike Cerritelli, they were given a full chance to respond to accusations directed against them.

[5] We note that resolution of the issue is consistent with, but does not involve application of, the modified Board Rules governing misconduct by attorneys and party representatives that went into effect on January 13, 1997. NLRB Rules and Regulations, Sec. 102.177.

[1] The first of such charges was filed on March 30, 1995. All dates referred to are in 1995 unless otherwise indicated.

[2] Respondent also filed, after obtaining my permission, a supplementary brief related solely to the effect of a recent decision of a Connecticut appellate court on one issue before me.

Several posttrial motions have been filed by the parties, as well as various responses to these motions. I shall deal with these motions in the course of the instant decision.

Based on the entire record, including my observation of the demeanor of the witnesses, I make the following[3]

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent, a corporation with an office and principal place in Quincy, Massachusetts, and facilities in Bridgeport and Cromwell, Connecticut, is a labor organization representing public and private sector employees in more than 100 affiliated locals throughout the United States.

During the 12-month period ending December 31, 1995, Respondent collected and received dues and initiation fees in excess of $250,000, and remitted from its Quincy, Massachusetts facility to the Washington, D.C. facility of Service Employees International Union, AFL–CIO, dues and initiation fees in excess of $200,000.

Respondent admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I so find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. RESPONDENT'S MOTION TO STRIKE

On September 19, 1996, Respondent filed a motion to strike documents attached as an appendix to the brief of the Charging Party. The Charging Party filed a response to the motion, dated October 10, 1996.

Attached to its brief, dated September 12, 1996, the Charging Party attached Appendixes I, II, and III. Appendix I and II are computer analysis of the expense reports submitted to Respondent by Sam Franzo, one of its supervisors.[4] Appendix III is a letter from the Charging Party's attorney to Respondent's attorney dated August 20, 1996, which explains Appendixes I and II, and asserts that he intends to include these charts in the Charging Party's brief. The letter further advises that Respondent's attorney review the documents, so that it will be able to respond in its brief if necessary, and to let the Charging Party's attorney know by August 27, 1996, if any errors were found so that corrections can be made.

Respondent made no reference in its brief to the appendixes, nor did it notify the Charging Party of any errors. Instead it filed its motion to strike, asserting that on receipt of the Charging Party's brief, an examination of Appendix I therein indicates that it is not the same chart which was included with the letter of August 20, 1996 (Appendix III). Therefore, Respondent sought to strike the entire appendix submitted by the Charging Party.

In its response, the Charging Party conceded that one of the printouts attached to its brief, Appendix I, had not in fact been supplied to Respondent's counsel in advance, as was reflected in Appendix III. However, the Charging Party argues that the printouts were not new evidence, but were merely summaries prepared by it to assist me in reviewing the Charging Party's Exhibit 6, which contained the actual expense reports submitted by Franzo. Thus, it is argued that the Charging Party was not obligated to submit these documents in advance, but did so as a courtesy to Respondent. Moreover, it also noted that the Charging Party did supply to Respondent in advance, Appendix II, which contained the same information as in Appendix I, which was not supplied, but was merely arranged in a different order. Moreover, the Charging Party also points out, correctly, that Respondent has not asserted that any of the appendixes are inaccurate or misleading in any way.

I completely agree with the position of the Charging Party as outlined above. The attachments in my view are merely summaries of documents previously admitted into evidence, and the Charging Party was not required to submit them in advance to Respondent. The fact that the Charging Party, as a courtesy attempted to do so, and mistakenly failed to supply Respondent with one of the two appendixes that it attached to its brief, should not preclude the Charging Party from having all its attachments considered. Moreover, Appendix II, which was received by Respondent in advance contained the same information as in Appendix I, albeit in a different order, and Respondent has not even suggested that either of the Appendixes contained any inaccurate or misleading data.

Accordingly, Respondent's motion to strike is denied.

III. THE GENERAL COUNSEL'S MOTION IN RESPONSE TO RESPONDENT'S WRITTEN COMMUNICATION TO THE ADMINISTRATIVE LAW JUDGE

Posthearing briefs were received from all parties on or before September 13, 1996. Subsequently, Kenneth T. Lyons, the national president of Respondent, sent a letter to me, dated September 27, 1996. No affidavit of service was included therewith, but the bottom of the letter includes a copy to Thomas Quigley, counsel for the General Counsel.

The letter reads as follows:

September 27, 1996

Honorable Steven Fish
Administrative Law Judge
National Labor Relations Board
Division of Judges
120 West 45th Street–11th Floor
New York, NY 10036–5503

Dear Judge Fish:

I am angered and dumbfounded, although not surprised by the libelous attack made by the alleged General Counsel Thomas Quigley against CPA Gary Edwards, National Vice President David Bernard, and myself, as president of the National Association of Government Employees.

Only someone with a warped mind and doing everything foul for his friend Russ See and Robert Cerritelli would lie, cheat and cover up for a person who flouted the law of Landrum-Griffin.

I pride myself for having forefathers who fought in the Civil War, World War I, and World War II, for that matter I was in World War II and called back during the Korean Conflict. I have four grandchildren in the military, two in the Air Force, one in the 82nd Airborne Division and one at the Academy.

[3] While every apparent or nonapparent conflict in the evidence may not have been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying and my evaluation of the reliability of their testimony. Therefore, any testimony in the record which is inconsistent with my findings is discredited.

[4] The actual expense reports submitted by Franzo were received in evidence at the trial.

According to the biased NLRB representative Quigley, he complained I was invisible. Mr. Quigley had every right to subpoena me to testify, and I would have been happy to alter my busy schedule and go one-on-one with this coward. His statements concerning me I know are privileged, or otherwise I would sue the devious character for libel.

My background is impeccable.

I won a major case of *Reynolds v. Wilson* when government agencies demoted and dismissed Jews and Blacks from the Federal service via a new efficiency rating system in violation of Section 14 of the Veterans Preference Act. It took five years to win the case and we restored thousands to their former positions and millions in back pay.

I am proud to represent over 150,000 Federal, City, State and County employees in the United States with offices in major cities throughout the United States.

I am proud of the fact that the Department of Labor has given NAGE audits not only high marks, but a clean bill every year.

Mr. Quigley should check to see if Mr. Cerritelli formed a unin to attempt to block charges of the aforementioned fraud.

Mr. Quigley, instead of attempting to show Mr. Cerritelli is innocent, attacks decent and honest representatives of both the government and the NAGE union.

At one time Al Capone's representative pleaded "Mr. Capone runs a soup kitchen for the poor, he must be a good man." Quigley is cut of the same cloth as the representative of Capone—his pleas are not that Cerritelli stole from our members, but our officers of NAGE should be ashamed of themselves for uncovering the crime and punishing the individual.

We of NAGE are well acquainted with the NLRB in Hartford, one of the pickets announced, "NLRB in Hartford is in bed with UAW." No, Mr. Quigley, we don't need his rugs, nor any further sampling of the biased NLRB in Hartford.

Sincerely,

Kenneth T. Lyons
National President

Thereafter, on October 4, 1996, a motion was filed in response to this letter by Jonathan B. Kreisberg, Regional attorney for Region 34.

Respondent filed a response to the General Counsel's motion, dated October 18, 1996, and the Charging Party filed a statement of position with respect to the General Counsel's motion, dated October 22, 1996.

The General Counsel's first request is to strike the letter from Lyons as an improper reply brief, which position was concurred in by the Charging Party. Respondent disagrees, asserting that the letter does not address the material issues in the case, or make or refer to a legal argument.

In my view, whether or not the letter was intended by Lyons to be a "reply brief" as such, it was clearly intended to respond to assertions made by the General Counsel in its brief, and to present facts to me which are not in the record.

Thus the General Counsel (as well as the Charging Party) made several references in their briefs to the failure of Lyons to testify on behalf of Respondent, and requested that adverse inferences be drawn from such failures. In an obvious response to justify his failure to appear, Lyons claims in his letter that Quigley could have subpoened him, and he would have been happy to alter his busy schedule and testify. Moreover Lyons also makes the assertion, totally unsupported by any record evidence that Robert Cerritelli (the discriminatee) "formed a Union to attempt to block the charges of the aforementioned fraud."

Finally Lyons makes several assertions containing his prior background and record, none of which was based on record evidence, all in an obvious attempt to persuade me to find in Respondent's favor.

Accordingly, I agree that this letter is in effect a reply brief, and should be given no substantive weight. Accordingly the General Counsel's motion to strike is granted.

The General Counsel also requests, supported by the Charging Party that sanctions be imposed against Respondent for Lyons' conduct in sending the letter, since it was a prohibited "ex parte communication" under Section 102.126 of the Board's Rules and Regulations. More specifically, relying on Section 102.33 of the Rules and Regulations, the General Counsel requests that an order to show cause issue why I should not find as an appropriate remedy for Lyons conduct, that Respondent's defenses in this proceeding should be "adversely affected."

The General Counsel argues in this regard, that given the "outlandish and unsubstantiated attacks by Mr. Lyons on all the other parties," Lyons has "demonstrated the likelihood that he authorized and committed all of the unlawful conduct which is presently pending" before me, and by ignoring the proper legal channels and appealing directly to me by nonrecord evidence, "Lyons has demonstrated that he will go to any length to win at all costs, and to have committed the violations which are alleged in the instant case."

Respondent asserts that the letter was not a prohibited ex-parte communication, since a copy was sent to the General Counsel and the Charging Party eventually received a copy of it. Respondent also contends that even if the letter is a prohibited ex-parte communication, to argue that the "letter somehow increases the likelihood that Mr. Lyons has committed and/or authorized illegal acts is preposterous and illogical."

I agree with the General Counsel and the Charging Party in that the letter constitutes an improper ex-parte communication. The letter does not come with any of the exceptions enumerated in the rules, and the Charging Party is clearly a party to this proceeding that Respondent was obligated to serve with copies of this communication. Whether or not the Charging Party eventually became aware of and/or received a copy of the letter is of no consequence, and not a defense to Respondent's failure to follow the Board's Rules.

While I also agree with the General Counsel's characterization of Lyons' attacks in the letter as "outlandish and unsubstantiated," I do not agree with the remedy requested by the General Counsel and the Charging Party. While Lyons' comments are certainly to be deplored, I do not view them as sufficiently probative of whether or not he or Respondent committed the violations before me for resolution. I shall, therefore, deny the request to issue an order to show cause in order to apply a remedy of "adversely affecting" Respondent's defenses in this proceeding.

However, that does not mean that Lyons' conduct must escape censure. I note that in his letter, Lyons accused counsel for the General Counsel of having a "warped mind," of lying, cheating, and covering up, of being "biased" and "devious," and compares him to "Al Capone's representative." Finally Lyons asserts that the National Labor Relations Board's office in Hartford is "biased" and "in bed with the UAW." In my view these statements made by Lyons are "unprofessional, intemperate, inflammatory, scandalous and wholly unfounded personal attacks" on the professional integrity of counsel for the General Counsel and the Region. *Frank Paxton Lumber Co*., 235 NLRB 582, 586–587 (1978). I also conclude that his conduct was "disgraceful and inexcusable," and warrants Board censure, even though Lyons is not an attorney. *State Bank of India*, 283 NLRB 266 fn. 1 (1987). Unfair and derogatory personal references to opposing counsel cannot be countenanced in Board proceedings, and can be construed as "aggravated misconduct" under Section 102.44(b) of the Board's Rules. In *re: Joel Keiler*, 316 NLRB 763, 767 (1995).

While Lyons' conduct did not take place during the hearing, it clearly relates to the hearing since it was committed in a posttrial letter, intended by Lyons to be in effect a "reply" brief. The Board has frequently condemned inappropriate and unsubstantiated attacks on counsel which were made in posttrial briefs. *Rowland Trucking Co*., 270 NLRB 247 fn. 1 (1984); *Frank Paxton*, supra; *Evans Products Co*., 136 NLRB 1423 fn. 1 (1962).

Accordingly, I conclude that Lyons should be severely censured for his "disgraceful and inexcusable" conduct, and that this case should serve as a warning that any future similar conduct by him will result in a more severe penalty than censure. *State Bank of India*, supra.

IV. BACKGROUND AND THE UNION'S ORGANIZATIONAL ACTIVITIES

Respondent is a labor organization which represents employees in both the public and private sector, but primarily public sector employees, in more than 100 affiliated locals throughout the United States. Its headquarters is in Quincy, Massachusetts, where in addition to Lyons, a number of other national officers, including Vice President David Bernard have their offices. Lyons is, according to Respondent's constitution, solely responsible for establishing the wages, hours, and working conditions of Respondent's employees, including transferring, promoting, disciplining, and discharging employees.

Respondent's nationwide operations consists of approximately 140 employees, which include national representatives, attorneys and secretaries. Two of its offices are located in Connecticut, in Cromwell and Bridgeport. These offices which are both under the direction and supervision of Santo Franzo consist of roughly 10 employees in the 3 categories set forth above.

None of Respondent's employees were themselves represented by any labor organization. In September 1994, two national representatives employed at Respondent's Cromwell office, Bob Cerritelli and Bill Stover, began discussing the idea of forming a union for the Connecticut employees. Cerritelli investigated various unions, and arranged for meetings with UAW officials and Respondent's employees. Subsequently authorization cards were distributed by Cerritelli to and signed by a number of Respondent's employees, at times at its Cromwell office.

On January 3, 1995, the UAW sent a letter to Respondent requesting recognition of the UAW to represent its employees in the State of Connecticut. Having received no response, the Union filed a petition in Case 34–RC–1311 on January 9, 1995, to represent the employees. That petition was withdrawn due to scheduling difficulties, and a new petition was filed in Case 34–RC–1315 on January 23.

On February 1, a representation hearing was conducted at the Regional Office. Respondent took the position at the hearing that the petitioned-for unit was inappropriate and argued that a New England-wide unit was required. The parties also litigated the status of Dominick Pettinicchi, who Respondent claimed was an independent contractor.

Cerritelli, Stover, and Attorney Ben Wenograd were the only unit employees to testify on behalf of the UAW at the hearing. On March 1, 1995, the Regional Director issued a Decision and Direction of Election, in which he rejected Respondent's argument for an expanded unit, as well as its contention that Pettinicchi was an independent contractor. Respondent's request for review of the Regional Director's decision was denied by the Board on March 28.

The election was held on March 29. Cerritelli served as the UAW observer in Cromwell and Stover in Bridgeport. The results of the election was; nine votes for representation and none against. The UAW was certified on April 7. On April 10 Cerritelli and Stover were elected as shop chair and steward of the unit employees, and on April 11 the negotiating committee of Cerritelli, Stover, and Sandra Chandler, secretary, and Catherine Monschien, attorney was also chosen. The Union notified Respondent by letter of April 11, signed by Cerritelli, of these selections.

V. RESPONDENT'S MARCH 22, 1995 LETTER

As noted above, the election was held on March 29. A letter dated March 22, was sent from Lyons at Respondent's Quincy office to Franzo its supervisor at the Cromwell location. The letter reads as follows:

> Dear Sam:
>
> Enclosed herein you will find bulletins from the National Labor Relations Board that have to be posted according to the directions contained therein.
>
> It appears that there will be an election for our Connecticut employees on Wednesday, March 29, 1995.
>
> I want you to know, Sam, I will have to act shortly as it relates to the number of attorneys we have representing our membership in Connecticut. I never received information from them as it relates to cases, whether we win or lose. I am also aware of the fact that we have more attorneys in Connecticut, per capita-wise, than any other office of ours in the country. Therefore, I will shortly be reducing that number to several employees.
>
> I will be in touch with you shortly.
>
> Sincerely,
>
> Kenneth T. Lyons
> President

When this letter was received at the Cromwell office, pursuant to the normal practice existing at the time, it was opened by Secretary Sue Silva. The letter was then placed in a manila routing file with a routing slip attached. The practice was that most correspondence or other items to be distributed to all employees and supervisors are opened by the secretary and left in

this file for the employees to receive. Employees would go through the folder until they find mail addressed to them, when they would pull out their mail, make copies of what is necessary, and check off their initials. This procedure would not be followed in the case of correspondence marked personal and confidential, wherein the secretary would not open the letter, but would presumably deliver it directly to the recipient or place the correspondence in the recipient's mailbox.

The above findings with respect to the past practice at Respondent's facility vis-a-vis the delivery of mail is based on a compilation of the credited testimony of Cerritelli, Kotecki, Secretary Sandra Chandler, and Attorney Donna Fiorentino. While the record does tend to show that employees did have individual mailboxes it is not clear precisely what items are placed in the mailboxes and what are left in the manila folder. The evidence reflects that office memos and individual employment agreement were placed in mailboxes, and decisions, briefs, publications, and reports are kept in the manila folder. As for individual mail, the testimony of Fiorentino is not clear, but Cerritelli, Kotecki, and Chandler were all emphatic that such mail is kept in the manila folder.

Significantly, neither Franzo nor Lyons testified, so this consistent and credited testimony stands unrebutted. More importantly, I agree with the General Counsel that the failure of Respondent to call these witnesses, particularly Lyons gives rise to an adverse inference that their testimony on this issue, i.e., the past practice of Respondent with respect to the distribution of mail, would not be favorable to Respondent. *Robin Transportation, Ltd.,* 310 NLRB 411, 417 (1993); *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

A number of employees including Cerritelli, Chandler, and Kotecki saw and read the letter on the day that it was received. Cerritelli informed the attorneys employed by Respondent about the letter, since their job status had been mentioned. The employees of Respondent were quite upset about the contents of the letter which was discussed by the employees at lunch that day.

Cerritelli also informed the president of the UAW, Russ See about the letter, which resulted in a charge filed by the Union on March 30, in Case 34–CA–6997 alleging that Respondent violated Section 8(a)(1) of the Act by its letter of March 22.

Shortly after the charge was received, Respondent modified its policy and instructed the secretaries that mail from "Quincy" to Franzo should henceforth be placed directly on Franzo's desk, and not placed in the circular file.

Neither Franzo nor Lyons had any discussions with employees about this letter. Nor did either of them send any letter or other correspondence to its employees clarifying or explaining this letter in any way.

The General Counsel contends that the letter violated Section 8(a)(1) of the Act since it likes the possibility of job layoff with the National Labor Relations Board election, and the letter was left in an open file, for all employees to see.

Respondent argues on the other hand, that the letter was not addressed to or meant to be seen by any employees, and that in any event contained no unlawful threats. It argues that since the letter was not meant for public viewing, Respondent cannot be held responsible for the unauthorized acts of bargaining unit employees. *Canyon Ranch, Inc*., 321 NLRB 937 (1996).

I am in agreement with the General Counsel's analysis of the facts with respect to this issue. While as Respondent correctly observes, the letter was sent by Lyons to Franzo and not directly to employees, this finding is not dispositive. In view of the circumstances herein, i.e., the mail distribution practice at Respondent's Cromwell office, it was reasonable for Lyons to have foreseen that employees would see and read this letter. *Cedar Grove Manor Convalescent Center*, 314 NLRB 642, 652 (1994) (threat made by one union business agent to another over the phone). Indeed, I conclude that this letter was sent "under such circumstances to insure that employees would hear of it." *Furniture Workers Local 140 (Brooklyn Spring Corp.)*, 113 NLRB 815, 822 (1955) (assault on supervisors by Union although not in presence of employees); *Reeves-Ely Laboratories*, 76 NLRB 728, 733 (1948) (statements made by official of Company at National Labor Relations Board trial even absent the presence of employees). See also *Norco Products*, 288 NLRB 1416, 1420 (1988) (statement made to nonunit employee found likely to be repeated to bargaining unit employees); and *Action Auto Shares*, 298 NLRB 875, 904 (1990) (unlawful statement made by one supervisor to another but overheard by employee. Found that supervisor should have reasonably expected his comments might well be overheard by employee).

In fact, particularly in the absence of any contrary testimony by Lyons, I conclude that not only should Lyons have foreseen that employees would read the letter, but that Lyons intended that they do so. In this regard I note that Lyons did not mark the letter personal or confidential which would have insured that it not be placed in the circular file, and that it would be distributed directly to Franzo. It is also noteworthy that the secretaries who open the mail are members of the bargaining unit, so that even absent Respondent's practice of placing mail in a file for all employees to see, it was reasonable to foresee that the secretary who opened the letter would read it and communicate the contents to other employees. Finally I also rely on the adverse inference rule set forth above to conclude that Lyons who did not testify, would have testified that he intended that employees read the letter.

Respondent's citation of *Canyon Ranch*, supra, is unpersuasive. There the Board found that an employee was not engaged in protected concerted activity when he read a draft memo from one supervisor to another which he found on a supervisor's desk and communicated the contents thereof to other employees. The Board concluded that the employee was engaged in "snooping," and that the memo was not left on the supervisor's desk for the purpose of having employees read it, and that the employee knew that the memo was "not his business." Those facts are clearly not present here, since as I have concluded above, the letter was sent to the Cromwell office by Lyons with the intention of having employees read it, and under such circumstances to insure that employees would become aware of it. *Reeves-Ely*, supra; *Brooklyn Springs*, supra.

Turning to the letter itself, Respondent argues that it refers to legitimate business concerns between two managers, and that it contains nothing threatening or unlawful. I disagree. While the letter does not make a direct link between the election and the possibility of layoff, in my view the inclusion of the discussion of laying off employees in the same letter with the announcement of the election creates the implication that these two events are linked, and that support for the Union might very well result in a reduction in the number of attorneys employed by Respondent. Such an implied threat of layoff has a reasonable tendency to coerce employees, and is violative of Section 8(a)(1) of the Act. *Frick Paper Co.,* 319 NLRB 9 (1995); *Columbus Mills, Inc.,* 303 NLRB 223, 232 (1991); *John As-*

cuago's Nugget, 298 NLRB 524, 533–534 (1990); *Harrison Steel Castings Co.,* 293 NLRB 1158, 1159 (1989).

I also note in this connection, that after the charge was filed, Respondent changed its mail distribution system in part so that all mail from "Quincy" (Respondent's main office) to Franzo would not be opened by a secretary, and be placed directly on Franzo's desk. However, Respondent made no attempt to clarify, explain, or repudiate the clear implication of this letter to its employees. Thus, if Respondent had not intended that employees both read the letter and come away with the impression that there was a possible link between the election results and the layoff of employees, it is logical to assume that it would have notified the employees that the letter was not intended to be seen by them, and that there was no connection between the election and the possibility of job loss. Respondent's failure to so notify its employees reinforces my conclusion set forth-above that Respondent violated Section 8(a)(1) of the Act by sending the letter in such circumstances to insure that employees would be likely to read it and/or become aware of it.

VI. RESPONDENT'S LETTER OF MAY 1, 1996

As will be detailed more fully below, Respondent's bargaining unit employees went out on strike in late March 1996. Prior to May 1, 1996, Lyons had received several letters from presidents of local Union's represented by the NAGE, expressing their support for the UAW in their dealings with Respondent, and/or criticizing Respondent's discharge of Cerritelli.

On May 1, 1996, Lyons sent a letter to all local union presidents consisting of an update on the UAW strike. During the course of this letter, Lyons stated as follows:

> The name-calling and expletives spewing out of the Bull Horn of some of the strikers does not bode well for their future as representatives. Some of them need psychiatric help indeed.

The General Counsel contends that by these remarks in this letter, Respondent has impliedly threatened to discharge employees in retaliation for their protected concerted activity in violation of Section 8(a)(1) of the Act. I agree.

Although this letter was sent by Lyons to local presidents, and not employees, once more I conclude, similar to the letter sent by Lyons to Franzo discussed above, and based on the same precedent that Lyons believed and in fact intended that this letter come to the attention of bargaining unit employees. In fact, the evidence discloses that bargaining unit employee William Stover received a copy of this letter from one of the local presidents whom he serviced.

Thus the fact that local presidents had previously written to Lyons on behalf of the strikers, coupled again with Lyons' failure to testify and deny that he intended employees to become aware of the letter, convinces me that Lyons believed that employees would in fact receive copies of this letter, and that he was desirous that Respondent's employees be notified of his sentiments concerning their strike activity.

Respondent argues however that the letter is an accurate statement of the law, and contains no unlawful threat. Respondent asserts that employees who engage in picket line misconduct that reasonably tends to interfere, intimidate, or coerce employees lose the protection of the Act, *Mohawk Liquor Co*., 300 NLRB 1005 (1990), enfd. 951 F.2d 1308 (D.C. Cir. 1991), and that profane and insulting language may rise to the level of picket line misconduct justifying the refusal to reinstate strikers *NLRB v. Longview Furniture Co*., 206 F.2d 274 (4th Cir. 1953). Once more I do not agree with Respondent's contentions.

While Respondent is correct that strikers can be denied reinstatement when their picket line conduct reasonably tends to interfere, intimidate or coerce employees, it is not correct in its assertion that profane and insulting language meets that standard.

Profane, crude, offensive, or obscene remarks by strikers do not rise to the level of coercive conduct justifying the failure to reinstate, unless they are accompanied by overt or indirect physical threats, or unless they raise the reasonable likelihood of a physical confrontation. *Nickell Moulding*, 317 NLRB 826, 827–830 (1995); *Medite of New Mexico, Inc*., 314 NLRB 1145, 1162 (1994), enfd. 72 F.3d 780, 792 fn. 9 (10th Cir. 1995) *Calliope Designs*, 297 NLRB 510, 520–521 (1984); *Catalytic, Inc*., 275 NLRB 97, 98 (1985).[5]

Since the letter sent by Lyons referred only to "name-calling" and "expletives" by strikers on the picket line, without any allegation of any threatening behavior, overt or implied by the strikers, it is clear that he was criticizing the employees for engaging in protected concerted activity. Therefore his further comments that this protected activity of the strikers, "does not bode well for their future as representatives," constitutes an implied threat of discharge of employees in retaliation for their exercise of protected activity in violation of Section 8(a)(1) of the Act. *Reno Hilton*, 320 NLRB 197, 207 (1995); *Concepts & Designs, Inc.,* 318 NLRB 948, 954–955 (1995).

VII. RESPONDENT'S LETTER OF MARCH 25, 1996

As noted above, most of Respondent's bargaining unit employees went on strike on March 25. Three of the employees, Benjamin Wenograd, Kenneth De Lorenzo, and Michael Tagliatela were attorneys, who were responsible for handling grievance hearings, disciplinary hearings, and other related matters on behalf of the members that Respondent represents.

On the first day of the strike, Franzo came out to the picket line and told the staff attorneys that he was swamped and asked them to call up and postpone all pending cases for that week. De Lorenzo, who had in fact not immediately joined the picket line, but finished a brief first after the strike began, called the parties in one of his scheduled cases and secured an agreement to postpone. De Lorenzo decided not to postpone a scheduled displinary hearing on March 26, and in fact attended that hearing on behalf of Respondent and the member, notwithstanding the strike.

Tagliatela, like De Lorenzo, attended an arbitration previously scheduled on March 25, the day the strike began and worked out a settlement agreement of that matter. On either March 26 or 27 Franzo informed Tagliatela that he (Franzo) had postponed all scheduled hearings for the next 2 weeks. Tagliatela also appeared on behalf of Respondent on an application to vacate an arbitration award in Hartford, at some point after the strike began.

On March 25, Lyons, on behalf of Respondent, wrote a letter to the State of Connecticut Grievance Committee. The letter informed the committee that three attorneys employed by Respondent had gone on strike and that he (Lyons) "had been advised that they have taken it upon themselves to delay or

[5] To the extent that *Longview Furniture*, supra, suggests otherwise, that is clearly contrary to established Board law. *Calliope*, supra at 522.

otherwise postpone all pending judicial and/or administrative matters in their portfolio in anticipation of the strike."

The letter goes on to assert that since an "attorney's first duty is to his client," he was troubled by this course of action. Therefore, Lyons requested that "your office commence the appropriate investigation and action." The letter requests that Respondent's chief counsel be contacted for specifics that may be needed. The names and addresses of the three attorneys were provided.

A copy of this letter was forwarded by the grievance committee to the three attorneys.

The record does not clearly reflect what action the committee took with respect to Respondent's letter. On April 8, 1996, the UAW's attorney sent a letter to the committee on behalf of the three attorneys. He made a number of assertions, including that attorneys are attorneys for NAGE and not the individual members, the right to strike by the attorneys is protected by Federal law; and that claims brought under state law for engaging in a strike is preempted under Federal law;[6] and that as a factual matter it was Franzo, Respondent's area director who ordered that all hearings be postponed.

The UAW's attorney received a letter from the committee, dated April 10, 1996, returning his April 8 letter, and stating, "if a complaint is filed against the above-referenced attorneys, they will be notified. At that time, you may file your appearance and response." The record does not contain any further documents concerning the status of the grievance proceeding.

However, De Lorenzo testified, although somewhat uncertainly, that "it might have been reactivated or appealed." He further testified that after Lyons was told that the committee does not investigate unless he actually files a grievance, Respondent did in fact file a "grievance" that was eventually dismissed by a two person panel, and he (De Lorenzo) believed that Respondent had appealed the dismissal.

The General Counsel contends that the March 25 letter of Respondent is violative of Section 8(a)(1) of the Act as an unlawful threat to file a complaint with the State Grievance Committee in retaliation for the employees' engaging in protected strike activity. *Clyde Taylor Co.,* 127 NLRB 103, 108 (1960). The General Counsel specifically disclaimed reliance on *Bill Johnson's Restaurants v. NLRB*, 462 U.S. 731 (1983) and its progeny, and argues that since Respondent did not follow through and file an actual complaint with the committee, its letter requesting that an investigation be conducted should be construed merely as a threat to file a complaint with the grievance committee.

Respondent does not appear to quarrel with the General Counsel's characterization of Respondent's action as a threat, but makes several arguments in support of its contention that the letter was not unlawful.

Initially it argued that since Respondent had an obligation under *Vaca v. Sipes*, 386 U.S. 171 (1967), to represent its members fairly. Lyons had a legitimate concern that attorneys may be subjecting NAGE to legal exposure by postponing hearings because of the strike. Thus, it is contended that the letter was not a threat but a legitimate effort on the part of Respondent to ensure that its agents do not violate its duty of fair representation.

Respondent raised an additional defense in its supplemental brief based on an Appellate Connecticut case, *Field v. Kearns*, 43 Conn. App. 265 (1996), cert. denied 239 Conn. 942 (1996). In that case, the court dismissed several state claims for abuse of process, defamation, and vexatious litigation on the grounds that persons who file or participate in attorney disciplinary proceedings are entitled to "absolute immunity" for such actions. The court held therein:

> The public policy of protecting the Courts and the public from the unethical and unprofessional conduct of attorneys is so strong that there is absolute immunity for the complainant in filing or otherwise causing the institution of attorney disciplinary proceedings. Id. at 277.

Respondent further argues that the unionized attorneys must continue to fulfill their ethical and professional obligations both before, during, and after a strike. Therefore, it asserts that regardless of Lyons' motives in writing the letter, Respondent is entitled under Field to absolute immunity for this conduct. Finally, Respondent contends noting the General Counsel's assertion that the letter is merely a threat to file a complaint, that the request in the letter to commence an investigation can only be construed as the "institution of an attorney proceeding" to which Respondent is entitled to absolute immunity.

In my view, whether or not the letter is construed as a threat or the attempted instigation of disciplinary proceedings against the employees, I conclude that its conduct is violative of Section 8(a)(1) of the Act. It is clear that a threat to file a lawsuit in retaliation for employees engaging in protected concerted activity violates Section 8(a)(1) of the Act. *Prime Time Shuttle International, Inc*., 314 NLRB 838, 842 (1994); *Wellstream Corp*., 313 NLRB 698, 706 (1994); *Consolidated Edison Co*., 286 NLRB 1031, 1033 fn. 8 (1987). Respondent's argument that the letter was not in retaliation for protected activity, but rather a legitimate effort of Respondent to ensure that its agents meet Respondent's duty of fair representation is misplaced and devoid of record support. The record contains absolutely no evidence that Lyons was concerned over legal exposure to NAGE by a possible failure to represent its constituents. On the contrary, the record evidence establishes that any hearings that were canceled were at the request of Respondent's supervisor Franzo or directly by Franzo himself. Since neither Franzo nor Lyons testified, the record contains no support for the assertion in the letter that attorneys "took it upon themselves" to cancel scheduled hearings in anticipation of a strike. In the absence of any such testimony or other evidence in support of these assertions, I conclude that Lyons had no basis for making such claims to the committee, that he simply made up these accusations in order to bolster his assertion that the attorneys violated their ethical obligations, and that he did so solely in retaliation for their protected conduct of engaging in a strike. I also note in this connection that Lyons made reference to the committee in an update on the strike to local presidents that he issued sometime in April 1996.[7]

In the "update," Lyons stated as follows: "As far as the attorneys are concerned, under Connecticut law for attorneys,

[6] The letter also noted that the UAW had filed a charge with the National Labor Relations Board against Respondent alleging that the filing of this purported grievance was unlawful retaliation for engaging in a strike.

[7] The document itself is undated, but it contains a date stamp of April 15, 1996, from the UAW, indicating that the Union received it on that date.

they may have violated the Canons of Ethics—nice going Russ See they could lose their ticket." This statement further demonstrates Lyons' animus toward the attorneys' engaging in a strike, and his intention to cause them to lose their licenses because of their exercise of protected conduct.

I also conclude that Respondent's reliance on *Field v. Kearns*, the Connecticut appellate decision is misplaced. Indeed, a strong argument can be made that the State committee's proceeding is preempted by the National Labor Relations Board's primary jurisdiction over the regulation of strikes, and could be enjoined on that basis. *NLRB v. State of Florida Department of Business Regulation*, 868 F.2d 391 (11th Cir. 1989); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 (1959). While there are exceptions in *Garmon* for remedies which are "deeply rooted in local responsibility," they have generally been found to be restricted to situations where violence is implicated, *United AA & AIW v. Wisconsin Employment Relations*, 351 U.S. 266 (1956); defamation, *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966); the intentional inflictions of emotional distress, *Farmers v. Carpenters*, 430 U.S. 290 (1977), obstruction of access to property, *Auto Workers v. Russell*, 356 U.S. 634 (1958), or trespass; *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978).

I need not decide, however, whether or not the state committee proceeding would fall within the exceptions to Garmon, since whether or not the proceeding is preempted by the National Labor Relations Board's primary jurisdiction, in my view State law cannot confer immunity from such primary jurisdiction of the National Labor Relations Board as Respondent contends. See for example *Sears, Roebuck*, supra, where the Supreme Court allowed the state court trespass proceeding to go forward notwithstanding the preemption contention, but relied heavily on the fact that the Union therein had the opportunity to present to issue of the legality of the picketing to the National Labor Relations Board, thereby retaining the protection against the risk of error in a state tribunal. Accordingly, I conclude that the state court's declaration of immunity cannot and does not apply to National Labor Relations Board proceedings, and provides no defense to Respondent's conduct herein.

Moreover, I also conclude that the question of pre-emption clearly comes into play, once the Board has issued its complaint. At that point Respondent is obligated to seek a stay of the state court proceedings. *Riesbeck Food Markets*, 315 NLRB 940, 943–944 (1994); *Loehmann's Plaza*, 305 NLRB 663, 670, 671 (1991). Since the current status of the state grievance proceeding is somewhat uncertain, I shall not find that Respondent further violated the Act by not seeking a stay of that proceeding.

I also conclude that even under a *Bill Johnsons*' analysis, Respondent's conduct is unlawful. That decision, on First Amendment grounds protects certain lawsuits from being found to be an unfair labor practice, but only where the lawsuit has a reasonable basis. In order to determine whether such a reasonable basis exists, it must be determined whether Respondent has presented the Board with genuine issues of material fact. Here no such factual issues have been presented, since Respondent adduced no evidence that any of the attorneys had canceled any hearings on their own, as alleged in Lyons' letter. Therefore, since the record is uncontradicted that they did not do so, and that any cancellations were ordered or effectuated by management officials, what is left of Respondent's claim is solely that merely by engaging in a strike, attorneys have violated their professional responsibility. Such a contention is obviously incorrect, and amounts to further demonstration of Respondent's unlawful motivation in writing its letter to retaliate against employees' protected activity in violation of Section 8(a)(1) of the Act. I so find.

VIII. RESPONDENT'S REQUIRING EMPLOYEES TO SIGN AN EMPLOYMENT AGREEMENT

Donna Fiorentino was employed by Respondent as an attorney. She was initially employed from 1983 to 1986. She was reemployed by Respondent in July 1995.

When she was rehired, among the documents given to her by Respondent was a three-page "Employment Agreement." The agreement provides that the employee "shall receive wages, benefits, and expense reimbursement as determined from time to time by the Employer, as well as provisions about benefits, expense reimbursement and duties of the employee. A number of sections of the agreement also set forth a noncompete clause for 2 years after termination, including a right of Respondent to receive money damages from the employee. Additionally the agreement states that any controversy or claim arising out of the agreement shall be settled by binding arbitration.

After reading the agreement, Fiorentino showed it to Cerritelli and asked his advice. She told him that she felt that since the Union was there in negotiations with Respondent that she should not have to sign it and that Respondent should go through the Union. Cerritelli replied that he would check with the UAW.

Meanwhile Fiorentino spoke to two other employees in the office, and was told by Doug Atkins that he had been asked to sign such an agreement by Respondent, but had not done so. She also spoke to Attorney Kathy Monschein, who told Fiorentino that she was not sure if she had ever signed such an Agreement. Cerritelli, after having spoken to the UAW, suggested to Fiorentino to let matters be and see if Respondent presses the issue. Therefore she signed the other papers given to her by Respondent, but not the employment agreement.

A week later, another copy of the agreement appeared in her mailbox, with a sticker from Franzo stating, "please sign immediately." On August 3, Fiorentino met with Franzo, with Cerritelli, present as her union representative. Franzo informed her that she had to sign the agreement. Cerritelli asked what will happen if she doesn't sign? Franzo replied that he had been told by Quincy that if she didn't sign it, that she would be terminated. Therefore Fiorentino signed the agreement on August 3.

On August 8, Russ See, the president of the Union, sent a letter to Lyons. The letter had requested that Respondent cease and desist from having bargaining unit employees sign employment contracts, since this is direct dealing with employees and is a subject which should be addressed at upcoming negotiations. The Union received no response from Lyons to this letter.

David Bernard, Respondent's national vice president testified that that since sometime in 1994, it has been standard practice for all employees of Respondent to sign the "Employment Agreement" that Fiorentino signed. The reason for requiring employees to sign these agreements, according to Bernard was that several former employees of Respondent had left the organization and "raided" NAGE locals resulting in a loss to Respondent of several of its locals. Bernard furnished no testimony as to why the other provisions of the agreement, such as

sections concerning wages, benefits, and expenses were included.

The foregoing facts establish a blatant violation by Respondent of Section 8(a)(1) and (5) of the Act. Once the Union becomes the recognized collective-bargaining representative of its employees, Respondent's actions in offering individual employment contracts to its employees, and insisting that they be signed as a condition of employment is clearly bypassing of the Union, and direct bargaining in violation of the Act. *Silverado Mining Co*., 313 NLRB 827 (1994); *Taft Broadcasting Co*., 264 NLRB 185, 186 (1982); *Import Body Shop, Inc*., 262 NLRB 1188, 1192 (1982).

Respondent defends its actions by arguing that the agreement is primarily a noncompetition agreement that has been required of all employees as a condition of employment since prior to the advent of the Union. Accordingly Respondent contends that since it is obligated to maintain existing terms and conditions of employment pending negotiations or an impasse, *NLRB v. Katz*, 369 U.S. 736 (1962), Respondent acted lawfully by continuing to require extention of the agreement.

However, Respondent overlooks the fact that the appearance of the Union as the collective-bargaining representative of its employees precludes Respondent from insisting on employees' signing individual contracts even though it had done so in the past. These agreements dealt with matters under negotiation with the Union, including wages, benefits, and expenses, as well as the noncompetition portion of the agreement.[8] The fact that Respondent had previously maintained this policy prior to the Union's designation as collective-bargaining representative does not exonerate Respondent from a finding that its conduct is unlawful. *Circuit-Wise, Inc*., 306 NLRB 766, 767 (1992) (Respondent violated Act by excluding the Union from its preexisting problem-solving grievance procedure).

Accordingly, Respondent has violated Section 8(a)(1) and (5) of the Act by bargaining directly with employees and requiring them as a condition of employment to sign individual employment agreements.

IX. FRANZO'S DISCUSSION WITH EMPLOYEES ON FEBRUARY 15, 1996

The parties began negotiations for a collective-bargaining agreement on September 11, 1995. Cerritelli and Stover were present on behalf of the Union, along with Steve Edgerly who attended in place of Russ See. The parties engaged in several subsequent negotiation sessions between October 1995 and February 1996, with Russ See present as a representative of the Union, along with Cerritelli and Stover.[9]

The Union at one of the earlier sessions made a wage proposal, which consisted of a step system with different levels and raises for different categories of employees. This proposal resulted in considerable discussion throughout the negotiations. As of the meeting held on February 8, 1996, Respondent's only proposal on wages was still a 1-year wage freeze. At this meeting Gary Gentile, Respondent's general counsel, who was Respondent's chief negotiator, indicated that he would see if he could get Lyons to agree to a step system. Gentile also informed the Union's negotiators that Respondent was going to do some sort of cost analysis for the Connecticut office, and that he hoped to have a wage proposal for the Union at the next meeting.

The next bargaining session was scheduled for February 16, but was subsequently canceled and rescheduled for February 21, 1996.

On February 15, 1996, several employees at the Cromwell office were eating lunch, including Chandler, Greg Kotecki, Michael Tagliatela, Sue Silva, and Sam Franzo. Franzo received a telephone call from Dave Bernard and went into his office to take the call. When Franzo finished the call he returned to the lunchroom with a piece of paper in his hand. Kotecki asked what was going on? Franzo informed the employees that he had just been given the wage scale that Respondent was going to propose at the next negotiation session with the Union. He asked if the employees wanted to know the figures, but emphasized that the discussion would have to be "off the record." Franzo added that he did not want any unfair labor practice charges filed against him if he gave this information to the employees. The employees discussed Franzo's request and agreed that they would not file any unfair labor practice charges, and that the discussion would be considered "off the record."

Franzo then proceeded to read off a wage salary scale to the employees, and Chandler wrote down the figures. When Franzo finished, several employees including Chandler and Kotecki complained that they were not pleased with the amount, that they should have been higher, and/or that the offer was inadequate. Franzo replied that he (Franzo) was shocked that Mr. Lyons had gone this far, and that he (Franzo) felt that the offer was a good starting point for an initial contract.

Shortly thereafter, Kotecki informed Cerritelli of these developments, who in turn notified See. See was quite upset that the members had received the numbers before the Union. See also told Cerritelli that in his opinion the bargaining unit cannot waive the rights of the Union to file an unfair labor practice charge.

At the next bargaining session February 21, 1996, Respondent presented to the Union the identical proposal that Franzo had disclosed to the employees on February 15. See informed Gentile that the Union had already been informed about the package, since the employees had previously been given the information by Franzo. See complained to Gentile that it would be difficult to "move furniture around" (i.e., agree to changes in Respondent's proposal), when the members had already been given the details. Gentile expressed surprise that the members had received notification of the proposal, and added that he knew nothing about it. Nevertheless, the parties have on February 21, 1996, and thereafter bargained extensively with respect to Respondent's proposal, and counterproposals and concessions have been made by both parties with respect to this issue.[10]

[8] Even the noncompetitioin aspect of the agreement is a mandatory subject of bargaining, particularly where as here it provides for damages payable to Respondent from the employees.

[9] On April 11, 1995, Cerritelli wrote a letter to Franzo advising that Cerritelli as of April 10 was elected as shop chair and Stover as steward. Additionally the letter advised that a negotiating committee had also been elected, consisting of Catherine Monschien, staff attorney and Sandra Chandler, secretary, in addition to Cerritelli and Stover. However, it does not appear that either Chandler or Monschien attended any negotiation sessions on behalf of the Union.

[10] The above findings are based on a compiliation of the credited testimony of Cerritelli, Kotecki, Chandler, Tagliatela, See, and Gentile, as well as bargaining notes of Cerritelli and Gentile. As noted above, Franzo did not testify.

I conclude that Franzo's actions on February 15, of notifying the employees of Respondent's offer prior to its submission to the Union, and discussing the offer with them, constitutes unlawful bypassing of the Union, and direct dealing with employees which thereby tends to undermine the ability of the Union to function as the collective-bargaining representative of its employees. *Lower Bucks Cooling & Heating, Inc*., 316 NLRB 16, 22 (1995); *Master Plastering Co*., 314 NLRB 349, 351 (1994); *Charles Parker Co*., 285 NLRB 56, 57–58 (1987); *TLI*, *Inc*., 271 NLRB 799, 803–804 (1984), enfd. 722 F.2d 894 (3d Cir. 1985). It is significant that not only did Franzo inform the employees about the terms of Respondent's offer, but also in response to several employees expressions of dissatisfaction, indicated that he was surprised that Lyons had gone so far and that he (Franzo) thought the offer was a good starting point for an initial contract. These are the kinds of discussions that should be held with the authorized collective-bargaining representative, and not with unit employees.

Respondent raises two defenses to Franzo's conduct, neither of which have merit. First it argues that the discussion was "off the record." While the characterization of discussions as "off the record" may have some legal significance where a mediator is involved or where collective-bargaining negotiations are being evaluated, in my view it cannot be construed as exonerating Respondent's conduct herein. The conversation was declared to be "off the record" only at the insistence of Franzo, and I agree with the General Counsel that the employees cannot waive the Union's rights to file unfair labor practices concerning unlawful conduct, whether or not the employees promised not to divulge the conversation which forms the basis for the allegation.

Respondent also argues alternatively that since one of the employees with whom Franzo discussed Respondent's offer was Sandra Chandler, a member of the Union's bargaining committee, Respondent could lawfully discuss these matters with an agent of the Union. *Globe Business Furniture, Inc*., 290 NLRB 841, 853 (1988). I do not agree. In *Globe Business*, supra, the administrative law judge, affirmed by the Board found that discussions with the Local bargaining committee and local union president about bargainable matters did not constitute unlawful direct bargaining, although the main spokesman for the Union therein was a representative of the National Union. Thus the administrative law judge noted that although the Employer therein had been directed to begin negotiations with the national representative, the statutory bargaining representative was the local Union, and the discussions were conducted with local committee members and officers. Therefore the administrative law judge concluded that the discussions of the local union officials were "representative" in nature, and that the Employer did not engage in unlawful direct dealing. Those facts are a far cry from the instant matter. There can be no reasonable construction of the facts herein to conclude that Chandler or any of the employees were engaging in actions "representative" in nature during these discussions. Indeed by insisting that the discussions were "off the record," Franzo was clearly not bargaining with Chandler as a "representative" of the Union, but as an employee with the hope and desire that the Union not be informed about the discussions. There can be no doubt that Chandler had no authority to negotiate on behalf of the Union and that Franzo was so aware. *TLI*, supra (direct bargaining with shop steward unlawful, since Employer knew that shop steward had no authority to negotiate on his own). Accordingly based on the above analysis, I conclude that Respondent has engaged in further violations of Section 8(a)(1) and (5) of the Act by the conduct of Franzo on February 15, 1996.

X. THE ALLEGED UNILATERAL CHANGES

A. Facts

On December 5, 1995, that a memo from Franzo to the employees appeared in their mailboxes. The memo states it had come to Franzo's attention that employees are eating and/or drinking at their desks or in the conference rooms. The letter goes on to say that "this activity is against company policy. I am therefore directing that all employees must adhere to the policy immediately."

However, prior to the appearance of this memo, employees had routinely drank coffee, juice, or soda at their desks, as well as eating popcorn, breakfast, and on occasion lunch at their desks.[11] Franzo had observed this activity in the past, and had never said anything about it to employees, nor had any directive been issued to employees indicating that it was "against company policy" to eat or drink at employees' desks.[12]

On December 19, 1995, Lyons issued a memo to all staff. After discussing organizing activities, and criticizing Connecticut for its lack of organizing, Lyons made another reference to alleged over staffing of attorneys in Connecticut.

The memo then reads as follows:

> We will have a new bonus plan in effect starting January 1, 1996, which should provide a stimulus for our organizers, attorneys and negotiators.
>
> In order to obtain a bonus, the representative must be the original contact with the lead. No bonus for leads generated through our advertisements.

According to Stover and Kotecki, the new bonus plan detailed by Lyons differed from the existing plan as it denied a bonus to employees for a lead generated through a NAGE advertisement.

Bernard testified on behalf of Respondent that there was nothing new about the bonus system in the memo, and the purpose of the issuance of the memo was to "stimulate organizing" and to "reinforce with the staff the fact that there is a bonus system in effect." He also testified that he has received the bonus in the past, and that in order to receive the bonus it has always been the policy that the employee must be the direct contact "as opposed to advertising." In support of Bernard's testimony, Respondent introduced a copy of a memo dated April 18, 1994, to all local offices from Lyons. The memo makes reference to the bonus plan, and instructs the supervisors in each office to "insist on each employee doing his or her best to obtain leads for new locals as well as promoting the organization." The details of the plan were then specified which were the same as in the December 10, 1995 memo. However the April 1994 memo makes no reference to a requirement that the employee must be the "original contact" in order to obtain the bonus, and there is no mention of the exclusion set forth in the

[11] Most of the time, however, employees would eat lunch in the lunchroom at the Cromwell office.

[12] The above findings are based on the testimony of employees Stover, Cerritelli, Kotecki, and Ken De Lorenzo. As noted Franzo did not testify. No other evidence was presented by Respondent as to why this change of policy was effectuated on December 5, 1995.

1995 memo that no bonus will be paid for leads generated through advertisements.

Bernard was asked why the memo by Lyons made reference to a "new" bonus plan, when as he testified there was nothing in the plan that was new. Bernard responded that he had no idea why Lyons used that term, and conceded that he did not ask Lyons why that word was used.

Based on the above, I credit the mutually corroborative testimony of Kotecki and Stover that the exclusion of leads generated through NAGE advertisements was a new requirement for the payment of the bonus. I find it significant in this regard that the memo written by Lyons used the word "new" and that no explanation was provided by any of Respondent's witnesses as to why this word was used to describe the plan. The 1994 memo introduced by Respondent allegedly to support Bernard's testimony that there was nothing new about the 1995 description of the plan, only reinforces my conclusion. While the 1994 memo does refer to the existence of a bonus plan, it makes no reference to an exclusion for leads generated by advertising, which Bernard asserts had always been the policy. Finally I again note the failure of Lyons, the writer of the letter to testify and explain why he used the word "new." It is once more appropriate to draw an adverse inference from his failure to testify on this matter, which further supports my conclusion that the memo announced a change in Respondent's prior policy with respect to the payment of bonuses for organizing.

On February 15, 1996, Bernard issued a memo to all employees of NAGE reading as follows:

> All employees are reminded of the fact that NAGE does not pay for the production of business cards.

In the past when employees at Respondent's Connecticut facilities needed business cards, they make a request of the secretary in the office, and she would arrange for the cards to be printed by a local supplier and paid for by Respondent.

Bernard testified that he issued the memo on February 15, 1996, to all of Respondent's offices because Respondent had received exorbitant bills from some employees in its San Antonio office for business cards. While discussing the issue with the Regional Director of the San Antonio office, Bernard was informed that the cards ordered there did not have a union bug. Bernard added that since he was employed by Respondent, it had a union print shop in Quincy where it produced business cards for employees. According to Bernard he issued the memo in order to inform Respondent's employees that it produces all business cards in Quincy with a union bug on the card at no cost to employees.

Stover testified without contradiction, that employees had never been informed that Respondent had a printer in Quincy that prints business cards.[13] Bernard furnished no explanation as to why he did not further explain his prohibitions against NAGE paying for the production of business cards, by adding that Respondent will provide them to employees at no expense to them.

By letter dated April 24, 1996, See requested that Lyons rescind its new policies. He referred to "(1) Giving bonuses for employees who organize. (2) Refusing to pay for employees' business cards. (3) Not allowing employees to eat and drink at their desks." The letter also demanded "immediate bargaining over these issues," and asked that Lyons "forward open dates as soon as possible to bargain."

Lyons responded by letter dated April 29, 1996. The letter first refers to the fact that See had been informed that Gentile was representing Respondent with respect to negotiations "between our organization and the alleged Local 376." The letter goes to indicate that the Union had filed unfair labor practice charges with respect to the three alleged charges, and added that "I am looking forward to the hearing by the National Labor Relations Board as I believe the three items are not only ridiculous but give rise to your frivolous agenda." Lyons made no response to See's request to bargain over these matters.

On May 1, 1996, as noted above, Lyons in an update to local presidents on the UAW strike, unlawfully threatened employees with discharge in retaliation for their protected strike activity. In that same update, Lyons made reference to these alleged unilateral changes. The letter states as follows:

> 1. They want to eat and drink at their desk rather than the new cafeterias that were supplied for them at the new buildings.
>
> 2. They want us to do away with bonuses employees earn when obtaining new locals (this group hasn't obtained any new locals)—we cannot understand their gripe.
>
> 3. They want to have the right to purchase business cards rather than having our union printers print them.
>
> We will let the NLRB hear and settle these issues.

The record contains no evidence that any employees of Respondent have been forced to pay for their own business cards.

None of these issues were brought up by either party during the course of negotiations between the parties, which lasted from October 1995 through at least June 1996.

B. Analysis

The General Counsel contends that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing conditions of employment by prohibiting employees from eating or drinking at their desks, changing its bonus plan, and by changing its policy with regard to the payment for business cards. *Pepsi-Cola Bottling Co. of Fayetteville, Inc*., 315 NLRB 882, 895 (1994); *Page Litho*, 311 NLRB 881 (1993); *Evertech Electrical, Inc*., 309 NLRB 896, 897 (1992).

Respondent makes three alternative arguments with respect to these allegations. First it argues that the General Counsel has not established any change in terms and conditions of employment. Second, it asserts that even if a change is found, the Union waived its rights to bargain over these matters by failing to request bargaining in a timely fashion after notification of the change. *United States Lingerie Corp*., 170 NLRB 750, 751–752 (1968); *YHA v. NLRB*, F.3d 168 (6th Cir. 1993); *Jim Walter Resources*, 289 NLRB 1441, 1442 (1988); *Merillat Industries*, 307 NLRB 1301, 1316 (1992). Finally, Respondent also asserts that the changes even if found did not have a demonstrably adverse effect on unit employees, and any such violation should be dismissed as "de minimis." *Coca-Cola Bottling Co*., 186 NLRB 1050, 1062 (1970); *General Electric Co*., 264 NLRB 306, 309 (1982).

I shall deal with these contentions seriatim. With respect to the issues of the eating and drinking rule and the bonus plan, there is no doubt that a change has been established. Prior to the memo from Franzo, employees had been permitted to eat and drink at their desks without any criticism from Franzo or

[13] I note that the business card which was obtained for Kotecki from a local Connecticut supplier contained a union "bug."

any other supervisor, and never had been informed about a rule prohibiting such conduct. Based on the credited testimony of Stover and Kotecki, the wording of the letter from Lyons, and Lyons' failure to testimony, I have concluded that the "new" bonus plan announced did contain a departure from past practice.

The matter of the business cards presents a much closer question, since although Bernard's announcement seems to suggest a new policy that employees will be compelled to pay for their own business cards, that does not seem to be the case. Thus Bernard's testimony, which is not contradicted, indicates that his intent in sending the memo was to inform employees that Respondent produced business cards at no cost to employees in Quincy, and the cards also contain a union bug. While it might have better had Bernard in fact made such an explanation in the memo, rather than merely stating that Respondent "does not pay for business cards," I do not believe that the General Counsel has established that Respondent intended to force employees to pay for business cards. However, Bernard's testimony coupled with the unrefuted testimony of employees, and the business cards themselves, do establish that a change has occurred in Respondent's policies. Thus in Connecticut, employees were able to order business cards from a local supplier, (which Respondent paid for), and were not compelled to use Respondent's Quincy printer for the ordering of cards.[14]

Respondent's contentions that the Union waived its rights to bargain over these changes by not requesting bargaining in a more timely fashion fails for several reasons. First, the principles cited by Respondent do not apply to a situation, where, as here, the parties are engaged in negotiations for a collective-bargaining agreement. In such cases, "the obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter, rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole." *RBR Electronics of S.D., Inc*., 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373 (1991). Thus absent exceptions set forth in *RBR*, supra, which are clearly not relevant here, Respondent cannot lawfully make unilateral changes in terms and conditions of employment, absent an overall impasse, regardless of whether the Union failed to make a timely bargaining request.

Second, even applying the timely notice rule, which does apply in noncollective-bargaining situations, Respondent's conduct would still not be excused by the Union's failure to make a more timely bargaining request. Here, unlike all of the cases cited by Respondent in support of its position, the Union was not notified of the changes until after Respondent notified the employees that the changes were in effect. Thus by the time the Union became aware of these changes they were a "fait accompli," and any request for bargaining would have been fruitless. *Brannan Sand & Gravel Co*., 314 NLRB 282 (1994); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983).

Accordingly, the failure of the Union to make more timely requests to bargain over the above changes does not excuse Respondent's conduct nor waive the Union's rights.

The final argument advanced by Respondent, however, presents more difficult issues. Thus, "in order for a statutory bargaining obligation to arise with respect to a particular change implemented by an employer, such change must be a material, substantial and significant one affecting the terms and conditions of employment of bargaining unit employees." *United Technologies Corp*., 278 NLRB 306, 308 (1986). See also *Murphy Oil USA*, 286 NLRB 1039, 1041 (1987).

In analyzing the changes effectuated by Respondent under the above standard, I have no difficulty in concluding that the changes in its bonus plan which were announced by Lyons' letter meets that test and is therefore violative of Section 8(a)(1) and (5) of the Act. *Harvard Folding Box Co*., 273 NLRB 1031, 1038 (1984). Respondent argues in this regard that no bargaining unit employee has ever collected under the bonus plan. This fact is of no consequence, as are the facts that no employee has been denied receipt of the bonus or that the changes have as yet not adversely affected any employee. The significant issue is the potential affect of the change and the clear change in eligibility standards for the granting of the bonus. Since the bonus plan now excludes payment for leads generated by advertising, this potential adverse effect on employees who might in the future become eligible for the bonus absent this change is sufficient to characterize the change as material, substantial, and significant. See *Carrier Corp*., 319 NLRB 184, 192–196 (1995) (merger of pension plans held to have significant impact on terms and conditions of employment, even though change resulted in no changes in pension coverage, benefit levels, or benefit administration, since change could affect future viability of the fund).

Turning to Respondent's decision to prohibit employees from eating and drinking at their desks, Respondent argues that is not a significant change, since the same employees still eat primarily in the lunchroom. I do not agree. "The availability of food during working hours and the conditions under which it is to be consumed are matters of deep concern to workers . . . . The terms and conditions under which food is available on the job are plainly germane to the working environment." *Ford Motor Co. v. NLRB*, 441 U.S. 448, 498 (1979), cited in *Mercy Hospital of Buffalo*, 311 NLRB 809, 871 (1993). In my view the privilege of consuming food and drinks, such as coffee, yogurt, juice, popcorn, as well as lunch if the employee so chooses, is a matter of significant concern to employees, and is not an inconsequential change to their working environment. *Mercy Hospital*, supra at 872 (change in cafeteria hours by eliminating service from 2 to 4 a.m. found substantial and significant change, although the same categories of food were available through vending machines); *Murphy Oil*, supra at 1042 (ban against posters, pictures, and calendars at workplace found to be meaningful and material condition of employment);[15] *Advertiser's Mfg. Co*., 280 NLRB 1185, 1190–1191 (1986) (change in area where employees were permitted to take breaks and lunch without notifying Union, violative); *Chefs Pantry*, 274 NLRB 775, 784 (1985) (revocation of privilege of permitting employees to put food in freezer and use for lunch); *Accurate Die Casting Co*., 292 NLRB 982, 989 (1989) (banning radios from the plant); *Lion Uniform Janseville Apparel*, 259 NLRB 1141, 1153–1154 (1982) (revocation of privilege of allowing employees to place lunch orders from outside restau-

[14] Whether this change is significant enough to rise to the level of a violation is another question, which will be dealt with below.

[15] While in *Murphy Oil*, supra, the Employer's new rule against eating and drinking on the premises was not found to be unlawful, this finding was not based on the insubstantiality of the change, but based on Federal law which prohibited eating and drinking near toxic materials.

rant); *Alberts, Inc*., 213 NLRB 687, 692 (1974) (prohibition of employees having coffee behind the wrapping desk when not busy).

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent violated Section 8(a)(1) and (5) of the Act by revoking the employees' privileges of eating and drinking at their desks.

However, the change that Respondent instituted with respect to the purchase of business cards, I conclude has a minimal and insubstantial present or potential affect on employees terms and conditions of employment. Thus the crucial factor is that employees have not and are still not required to pay for business cards out of their own funds. While employees are now required to obtain their cards directly from Respondent's Quincy printing facility, and can no longer order them from local suppliers as in the past, this change is neither material, significant, or substantial. Therefore I conclude that Respondent has not violated the Act by making this change, and shall recommend dismissal of this allegation of the complaint.

XI. RESPONDENT'S ACTIONS WITH RESPECT TO DOMINIC PETTINICCHI

As noted above, during the course of the representation hearing, Respondent took the position that Dominic Pettinicchi was an independent contractor and not an employee under the Act. This position was rejected by the Regional Director, who concluded that he was an employee and eligible to vote in the election.

Prior to the February 8, 1996 bargaining session, the employees had heard that Pettinicchi (who was a part-time representative) had been promoted to the position of assistant director in the Bridgeport office. At the bargaining meeting, Cerritelli asked Gentile if the rumor he had heard about Pettinicchi's promotion was true. Gentile appeared surprised and gave no response. However, Bernard answered that in fact Pettinicchi had been promoted to assistant director. After a caucus Gentile informed the Union that he had checked the matter out and that Pettinicchi had been promoted to assistant director in Bridgeport.

Cerritelli asked for a description of Pettinicchi's job duties and responsibilities and whether he would be doing bargaining unit work. Gentile responded that Pettinicchi would continue to perform the same work that he had performed before, i.e., servicing locals, but he would no longer be considered part of the bargaining unit. Cerritelli also asked who Pettinicchi would answer to? Gentile replied that Pettinicchi would report to Franzo.

Cerritelli then complained that this action violated the spirit of the parties previous agreement on subcontracting bargaining unit work. Cerritelli pointed out that the Union had previously agreed that Franzo could continue to perform bargaining unit work, as he had before, but that the Union wanted to preserve the rest of the bargaining unit work.

Gentile replied that Respondent was not contracting out any work, that it was going to be performed by a NAGE employee, similar to the situation with Franzo. He added that Respondent had previously rejected a union proposal for rigid job descriptions by informing the Union that NAGE is a service organization and attorneys, secretaries, and representatives do similar work at times, and sometimes NAGE staff from other offices come in and do work. Thus the Union withdrew its proposals for specific job descriptions. Gentile reminded the Union of their prior discussions in that area, and reiterated its position that any NAGE employee can perform any work. In Gentile's view, the Union's position on Pettinicchi that he was doing bargaining unit work is exactly the type of discussion that he did not want to get into.

Cerritelli then asked for a written description of Pettinicchi's job responsibilities and duties. Bernard replied that Respondent did not have one.

The parties have continued to bargain over the issue of Pettinicchi performing bargaining unit work, but no tentative agreement has been reached, and this issue is still one of the remaining open items.

Bernard testified that the decision to promote Pettinicchi was made by Lyons in February 1996 based on his (Bernard's) recommendation. Bernard asserts that he believed since 1992 that each office of Respondent should have a supervisor, and that Bridgeport was the only one that did not. He had made recommendations to Lyons to this effect prior to 1995 and 1996 but Lyons had not agreed and had not promoted anyone. However, in late 1995 and 1996 there were rumors of a possible strike by the UAW, so Bernard's recommendation to appoint a supervisor in Bridgeport produced an added reason that in the event of a strike, Respondent would be able to cover the work at Bridgeport by using a supervisor. Lyons finally agreed with Bernard, based on this additional factor and promoted Pettinicchi in early February 1996 to assistant director. In that position he directs and supervises the staff at Bridgeport, and is the conduit between the office and the national office in Quincy. He also continues to perform the same work that he performed prior to his promotion, consisting of servicing of a number of locals.

The complaint alleges two violations by Respondent concerning its conduct with regard to Pettinicchi. The complaint alleges and the General Counsel contends that Respondent has since on/or about February 8, 1996, refused to supply the Union relevant information concerning the job duties, assignments, and status of Pettinicchi.

I do not believe that the record establishes that Respondent violated the Act in that connection. In fact, Respondent's representatives orally gave the Union answers to all its questions concerning Pettinicchi's responsibilities and status. The Union was told that he would be reporting to Franzo, that he would continue to service his locals as he did prior to his promotion, and that he would no longer be considered part of the bargaining unit. While the Union was not satisfied with this explanation, and did not agree to Respondent's position, particularly with regard to Pettinicchi performing bargaining unit work, there is no showing that any more information was required or needed.

While Cerritelli did make a request for a written job description of Pettinicchi's duties and responsibilities, Respondent informed the Union that no such written job description exists, and no evidence was presented by the General Counsel that this assertion was not correct. Since no written job description exists, Respondent has not violated the Act by failing to turn such a list over to the Union. *Whittier Area Parents' Assn. for the Developmentally Handicapped*, 296 NLRB 817 fn. 1 (1989).

I also note that the Union did not follow up its oral requests in writing for such information as it did with respect to other information that it desired, which further tends to show that it had no need for any additional information with respect to Pet-

tinicchi. I shall therefore recommend dismissal of this allegation of the complaint.

The General Counsel also alleges that Respondent has violated the Act, since when it promoted Pettinicchi to a supervisory position, it also removed bargaining unit work.

In that connection, while an Employer has no obligation to bargain with the Union concerning its decision to create a new supervisory position nor to the selection of individuals to fill these positions, *St. Louis Telephone Employees Credit Union*, 273 NLRB 625, 627–628 (1984), where the newly promoted supervisor continues to perform bargaining unit work, this constitutes a removal of bargaining unit work. In such circumstances, the Employer must bargain with the Union in good faith and may unilaterally change the bargaining unit's work only after a lawful impasse. *Hampton House*, 317 NLRB 1005 (1995); *Legal Aid Bureau*, 319 NLRB 159 fn. 2, 163 (1995); *Brunswick Electric Corp*., 308 NLRB 361, 396 (1992).

Here that is precisely the situation. Respondent has promoted Pettinicchi, and admittedly has continued to assign him bargaining unit work. The fact that as Respondent contends Pettinicchi performed this work prior to his promotion is of no consequence. Nor is it relevant that Franzo has also continued to perform bargaining unit work, and the Union agreed to this practice. The fact is that the Union never agreed to allow Pettinicchi to perform unit work, and vigorously protested this action by Respondent.

Respondent also argues that it has met its obligation to bargain over the impact of the decision by continuing to bargain with the Union over this issue, including the question of the loss of unit work during the current negotiations. However, as the above-cited cases make clear, Respondent must not unilaterally assign the unit work unless and until the Union consents, or the existence of a valid impasse. It cannot, as it did here, unilaterally make the assignment of unit work to Pettinicchi, and then agree to bargain about its impact thereafter.

Accordingly, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act by failing to give notice and bargain with the Union over the removal of unit work. *Hampton House*, supra; *Legal Aid*, supra; *Brunswick*, supra.

XII. THE INFORMATION REQUEST CONCERNING THE DISCHARGE OF CERRITELLI

As will be more fully discussed below, Cerritelli was discharged by Respondent on September 15, 1995, allegedly for filing fraudulent expense reimbursement claims. As also will be discussed in more detail below, See had been present on September 14 at the Cromwell office when Stover was questioned by Gary Edwards a CPA for NAGE about his understanding of Respondent's reimbursement policies for meals, gas, and telephones, as well as about particular transactions involving these issues. During the course of these discussions, See continuously asked Edwards what Respondent's policies were with respect to those questions that Edwards asked of the employees. Edwards replied either that he did not know what Respondent's policies were, or that it followed U.S. Department of Labor Guidelines.

Thus, on September 15, See wrote a letter to Lyons, requesting information that he considered "necessary in order to properly represent the bargaining unit employees." See requested written meal, gas, and telephone policies used by Respondent with respect to its employees, including how long these policies have been in effect, have there been any changes in these policies in the past year, were they issued in writing to unit employees, and are they standard to all NAGE offices? The Union received no response to this request letter.

On September 15, the very same day that it sent its letter to Respondent, requesting information as detailed above, unfair labor practice charges were prepared and signed by Russ See, and apparently mailed into the Board. These charges were received by the Regional Office on September 18, and charges in Case 34–CA–7235(1–3) were filed on that date, and served on September 19. These charges allege that Respondent dealt directly with its employees (Case 34–CA–7235–1), retaliated against Kotecki, Stover, and Cerritelli by commencing an audit on these individuals on September 14 (Case 34–7235–2), and that Respondent since on/or about September 14, refused to give information to the Union pertaining to an audit due on bargaining unit employees.

On September 19, the Union filed an unfair labor practice charge in Case 34–CA–7240 alleging that the discharge of Cerritelli was violative of the Act.

On September 26, See sent another letter to Lyons, announcing that Stover will be acting shop chairperson replacing Cerritelli. The letter also reminds Lyons of the September 15 information request which had not been responded to, and states that the Union needs the information as soon as possible, and asked Lyons to "please comply." The Union received no response to this letter.

On September 27, See wrote another letter to Lyons. This letter referred to the termination letter given to Cerritelli, which made reference to an attached letter from Edwards to Lyons detailing Edwards' findings concerning Cerritelli. See asked Lyons to provide the Union with items one through eight in the letter of Edwards, plus copies of the weekly expense reports for the dates in the items above. Once again, the Union received no response from Respondent to this request.

During the course of negotiations, See asked orally about Respondent's policy with respect to reimbursement policies. Gentile replied that Respondent had no written policy. See also made reference to his written information requests that he had made to Lyons. On several occasions Gentile replied that he had not received them or knew nothing about them. See answered that Lyons had received the letters but made no follow-up requests to Gentile for the information.

In that connection, See had written a letter to Lyons dated August 7, 1995, pertaining to other information requests, and requested dates for meetings. Lyons gave a copy of this letter to Gentile, with a handwritten note instructing Gentile to notify See that he should contact Gentile from then on. Thus Gentile sent a letter to See, dated August 11, advising that he represents Respondent with regard to negotiations, and asking that all future "communications pertaining to this matter" be directed to him, and that he be called in order to set up negotiations.

According to Gentile he answered all information requests that he became aware of. He recalled seeing the request for written policies concerning reimbursement, and asserts that he responded orally to See that Respondent had no such written policies. Gentile did not recall seeing the Union's request for information that Respondent relied on to terminate Cerritelli.

Respondent contends that the Union is not entitled to the information requested in the above-described letters since the information requested involves Respondent's defenses to the unfair labor practice charges that the Union filed. *General Electric Co*., 163 NLRB 198, 210 (1966), enfd. 400 F.2d 713

(5th Cir. 1968); *Huck Mfg. Co*., 254 NLRB 739, 755 (1981). I agree.

Thus here, on the very same day that the Union filed its information request pertaining to Respondent's reimbursement policies, September 15, the Union signed and mailed to the Region an unfair labor practice charge raising the same matters sought in the information request. Thus before Respondent even had knowledge of the request, let alone an opportunity to respond, the Union was charging it with violating the Act by failing to provide the information. Thus it is evident that the Union chose to prosecute these matters through the Board's procedures rather than to bargain with Respondent, and its request was akin to a discovery device pertinent to its pursuit of the charge rather than to its duties as a collective-bargaining representative. *WXON TV*, 289 NLRB 615, 617–618 (1988). Therefore Respondent did not violate the Act by refusing to comply with the Union's September 15 and 26 requests for information.[16]

For similar reasons, I conclude that Respondent's failure to comply with the Union's September 27 request for information relating to the discharge of Cerritelli was not unlawful. Since the Board procedures do not include pretrial discovery when information sought relates to a pending 8(a)(3) charge, it will not find that a refusal to provide such information violates the Act. *Pepsi-Cola Bottling Co. of Fayetteville, Inc*., 315 NLRB 882 (1994); *Union Tribune Publishing Co*., 307 NLRB 25, 26 (1992); *WXON*, supra.

Here, the Union filed its charge with respect to discharge of Cerritelli on September 19, and its information request over a week later. The materials requested clearly relate directly to Respondent's defense to the termination, and therefore Respondent did not violate the Act by refusing to turn this material over to the Union. *Pepsi-Cola*, supra; *Union-Tribune*, supra; *General Electric*, supra.

Moreover, I also conclude that the filing of the unfair labor practice charge with regard to Cerritelli's discharge also provides additional support for Respondent's refusal to supply the information with regard to its reimbursement policies as requested in its September 15 and 26 letters. These items also clearly relate the defense of Respondent to Cerritelli's discharge, since it would also be asking to pretrial discovery. *Pepsi-Cola*, supra; *Union-Tribune*, supra.

Accordingly, based on the foregoing analysis and authorities I find that Respondent did not violate Section 8(a)(1) and (5) by refusing to supply the information requested by the Union in its letters in September 1995.

XIII. AUTHORITY OF RESPONDENT'S NEGOTIATORS

The complaint alleges that Respondent failed to designate an individual as its collective-bargaining representative who possessed authority to enter into a final agreement. The complaint further alleges that by its overall conduct including the failure to designate such an individual plus the other violations of Section 8(a)(5) of the Act previously alleged, Respondent has failed and refused to bargain in good faith with the Union.

In that connection, prior to negotiations commencing, Lyons met with Gentile and gave Gentile full authority to negotiate on Respondent's behalf and to enter into any tentative agreements, as well as to work out ground rules for negotiation with the Union.

At the first bargaining session, on September 11, 1995, the parties discussed and agreed to a set of ground rules for negotiation, including a provision that tentative agreements that may be reached will be initialed by both parties, and once tentative agreements are reached on all issues, they shall be consolidated into a document and available to both bodies for ratification and approval. Further the document states that their "respective negotiating teams have the authority to approve a final tentative agreement at the bargaining table and will recommend said agreement to their bodies for ratification and approval."

At this first meeting, union negotiators asked Gentile if he had the authority to negotiate and enter into tentative agreements. Gentile replied that he had such authority but that Lyons had the final authority to approve any agreement ultimately reached.

By the close of the second negotiation session, on October 30, 1995 the parties had reached tentative agreements on 20–25 issues. At that session See complained that Lyons was not present at the meetings, and asserted that Gentile had no authority to negotiate. Gentile insisted that he did have authority.

At the next meeting, December 18, the parties discussed the tentative agreements which had been reached on October 20, from a document prepared by Cerritelli allegedly incorporating these agreements. There was some dispute about the accuracy of Cerritelli's document, but the issues were ultimately worked out. The parties initialed their agreement to 27 items on December 18, 1995. These items included recognition, union security, violations, hours of work, leave, grievance procedure, including arbitration, automobile and expense allowance, and seniority.

The parties continued to negotiate on January 19, February 8, and 21, and March 1, 1996, by which time tentative agreements were reached on nearly 20 additional items, including issues involving seniority, layoffs, holidays, vacations, payment for negotiation sessions, attendance at educational seminars, time off with pay for union business, and a successors and assigns clause.

At the February 8 session, Bernard became involved in negotiations, at the recommendation of Gentile who recommended to Lyons that as a sign of good faith it would be advisable to have a national officer present. Prior thereto, at the December 18, 1995 session, See continued to demand that Lyons be present, and went so far as to suggest bargaining sessions for 3 consecutive days, but only if Lyons was present.

At the February 8, 1996 meeting when Bernard was introduced, See questioned Bernard's authority as well. Bernard replied that he had authority to shake hands, and that he could "cut a deal right now." At that meeting the subject of wages was discussed, and Gentile indicated that some sort of a salary structure was possible, and since Respondent had now prevailed in a number of contested elections, which could have lost its members, it would be preparing and submitting a wage proposal at the next meeting.

At that next meeting February 21, 1996, Respondent as promised submitted its wage proposal, which included increases of up to 34 percent at the top of the scale for some employees. This proposal was not accepted by the Union, but considerable discussion ensued concerning this issue. During these discussions Bernard and/or Gentile asserted that they had to sell this salary schedule to Lyons, that there was some "wig-

[16] In view of this finding, I need not decide the validity of Respondent's alternative contention that it need not reply to the request since it had no written policies concerning the matters involved.

gle" room in the middle of the scale, and that Bernard "fell on his sword" in making these proposals. They also made statements at this, as well as at other sessions that they had no authority to go any higher in certain areas, or that they had to get Lyons to approve certain changes, and/or that they would take certain recommendations to Lyons. These kind of comments produced once again assertions from See that Bernard and Gentile had no authority to negotiate, and that Lyons should be available and/or present at the meetings. Gentile responded consistently to these assertions by insisting that he (and Bernard) had authority to negotiate and agree, and made specific reference to the fact that the parties had signed off on 45 items.

The parties have continued to bargain up through the close of the instant hearing, with several outstanding issues remaining including wages, insurance, auto allowance, the status Pettinicchi, guaranteed no layoff language, management rights, no-strike, no-lockout, anticompetition employment agreements, and the reinstatement of backpay for Cerritelli.[17]

My factual findings as detailed above with respect to the "authority" issue is based on a compilation of the credited testimony of Cerritelli, See, Gentile, and Bernard, as well as the bargaining notes of both Gentile and Cerritelli.

Based on my factual findings as detailed above, I conclude that General Counsel's contention that Respondent failed to designate its negotiators with sufficient authority to carry on meaningful bargaining regarding fundamental issues, *Wycoff Steel, Inc*., 303 NLRB 517, 525–526 (1991), must fail.

While the evidence revealed that final authority to enter into an agreement was reserved to Lyons, and there were times during negotiations when Gentile or Bernard indicated that they had to consult with Lyons on certain issues, these facts are hardly sufficient to establish that these limitations acted to inhibit the progress of negotiations.

Rather, and most significantly, the parties reached tentative agreement on over 45 items during negotiations,[18] some on important areas such as union security, seniority, vacations, holidays, grievance procedures, layoffs, and a successors and assigns clause. In my view the evidence reveals that See's constant questioning of the authority of Respondent's negotiators and his insistence that Lyons be present, as well as his continued insistence on the reinstatement of Cerritelli did as much to inhibit progress in negotiations as any actual lack of authority of these negotiators.

Accordingly I shall recommend dismissal of this allegation of the complaint, as well as the paragraph which alleges that Respondent was guilty of overall bad-faith bargaining by its conduct, principally based on this alleged lack of authority.[19]

[17] In that connection, the Union continued to press for the reinstatement and backpay of Cerritelli. See conceded that at one point he might have said at the negotiations that unless Cerritelli comes back to work, there is no contract. See added however that the Union made a proposal to resolve that issue that the parties agree not to appeal the administrative law judge's decision, which was still under consideration at the time of the trial.

[18] *88 Transit Lines, Inc*., 300 NLRB 177, 178 (1990).

[19] While I have found above that Respondent violated Sec. 8(a)(1) and (5) by several unlawful unilateral changes, as well as acts of direct bargaining, these findings are insufficient to establish overall bad-faith bargaining.

XIV. THE TERMINATION OF CERRITELLI AND RESPONDENT'S AUDIT

A. Facts

As noted above, the UAW's organizational drive began in September 1994 and was initiated, and spearheaded by Cerritelli, with the assistance of Stover. The UAW filed a petition on January 9, 1995, with the Region, but due to a scheduling conflict, was withdrawn and refiled on January 23. This resulted in a hearing on February 1, during which Respondent contested the scope of the unit, claimed that Pettinicchi was an independent contractor, and not an employee. During the hearing, Cerritelli, Stover, and Ben Wenograd testified on behalf of the UAW.

As also reflected above, the Regional Director issued a Decision and Direction of Election finding in favor of the Union on all issues, which resulted in an appeal by Respondent, and a denial of its request for review on March 28.[20]

At the election held on March 29, Cerritelli and Stover served as observers for the Union at the two locations involved. The UAW was certified on April 2, and Cerritelli and Stover were subsequently elected as the shop chair and steward respectively for the Union, as well as members of the Union's negotiating committee.

As I also concluded above, Respondent violated Section 8(a)(1) and (5) of the Act by requiring Attorney Fiorentino to sign an individual employment agreement as a condition of her employment in July and August. I also note that Cerritelli consulted with Fiorentino with respect to this issue, and represented her in discussions with Franzo concerning whether she would be required to sign this agreement.

The first negotiation session between the parties was held on September 11, during which Cerritelli and Stover attended, and Cerritelli emerged as the chief spokesman for the Union at that meeting,[21] and signed the "ground rules" agreed to by the parties on the Union's behalf.

Three days after this meeting, September 14, Cerritelli, Stover, and Greg Kotecki were informed that they must be present at the Cromwell office to meet with Gary Edwards, a CPA for Respondent to review their expenses. It is undisputed that Edwards' visit to Cromwell was the first of its kind at any of Respondent's Connecticut facilities.

When Cerritelli was informed about the meeting, he attempted to contact See because he feared that the "audit" might result in disciplinary action. He eventually reached See who informed Cerritelli that he would be at the office within an hour.

When Edwards arrived at the office, the employees were eating lunch. After they finished lunch, the three employees decided to notify Edwards that they wished to wait for See to arrive before starting the meeting. Thus they approached Edwards and Cerritelli asked if the audit could result in discipline? Edwards did not answer the question, and merely replied that he was a CPA hired by NAGE to do audits around the country. Cerritelli replied that in his opinion discipline could result, so they wanted to wait for their union representatives to arrive, who were on their way and expected shortly. Edwards made no

[20] I have concluded above that Respondent violated Sec. 8(a)(1) of the Act by Lyons' letter of March 22 threatening employees with layoffs in reprisal for their union activities.

[21] Russ See was not present at this first meeting.

response, but made no objection to waiting for the union officials before meeting with the employees.

About 1:45 p.m., See arrived accompanied by Steve Edgerly, another union representative. After consulting with the employees, the group proceeded to the conference room where Edwards was waiting. See asked if the audit could result in discipline? Again Edwards did not answer, but repeated that he was the accountant hired by NAGE, and was not an employee of NAGE. Finally after more probing, Edwards admitted that in the past it has resulted in discipline. See then stated that he and Edgerly would be present. Edwards did not object.

The group then moved upstairs to a larger conference room. See asked what guidelines Edwards uses for the audit. Edwards replied Department of Labor rules. See asked if NAGE had separate guidelines for expenses and Edwards said no and asked to meet with the employees one at a time. Stover decided to go first, so Cerritelli and Kotecki went to their respective offices.

The meeting with Stover, in the presence of Edgerly and See began with Edwards asking Stover his understanding of Respondent's meal expense reimbursement policy. See interrupted and asked what NAGE's policy was? Edwards replied that he did not know. Again See asked what guidelines Edwards was following and Edwards replied guidelines set by the U.S. DOL.

Edwards at that point removed from his files a document with two meal receipts attached. One receipt from Stover's expense report was dated July 17, 1995, with receipt #80418, and the other was submitted by Cerritelli for a meal on May 31, 1995, with receipt #80416. Edwards asked Stover if he ever noticed Cerritelli or anyone else taking receipts when they had a meal together. Stover replied that he had not. See then asked if employees were allowed to submit another receipt if the original one was lost. Edwards replied no, that is fraud, and added that if a receipt is lost, the employee should attach a note explaining the situation to his blue sheet,[22] and would have been paid.

See asserted that Edwards was accusing Stover of fraud, that he is entitled to an attorney, and the meeting was over. Edwards was asked to leave the room and he did so. The employees and the union representatives caucused, and after See made some phone calls to the UAW office, they decided to continue with the meeting with Stover, and invited Edwards to return.

Edwards asked Stover for his interpretation of Respondent's gasoline reimbursement polices, and again See interjected by asking Edwards what Respondent's policy was, and again Edwards responded that he did not know. Edwards then asked Stover if he filled up his car with gas on Fridays and Mondays, and Stover replied that the answer depended on if he worked over the weekend and he would need to check his records. See asked if Edwards had a problem with Stover's gas expenses? Edwards answered no, and moved on to ask Stover for his understanding of the telephone reimbursement policy of Respondent. Once more, See interrupted and turned the question back to Edwards, who once again replied that he did not know.

At that point, Edwards, clearly annoyed and upset about See's constant interruptions, terminated the meeting with Stover. At that point Cerritelli was asked to come in to the conference room, while Stover was still present. See asked Edwards for copies of all these records that Edwards had in his possession that he questioned Stover about. Edwards responded that he would have to check with his client. See asked Stover to make a request for the documents that Edwards had with respect to him, and Stover did so. Edwards again replied that he would have to check with his principals. See informed Edwards that if he was not going to give them copies how can they answer any questions? See added, "this question and answer period is over." At that point Edwards began to pick up his files. Cerritelli who was at that point sitting down at the table with his papers in front of him, said to Edwards, "I am willing to answer any questions on my expenses, but this is obviously a witch hunt." Edwards ignored Cerritelli, said nothing to him, continued packing up his files, and left the conference room.

As he was leaving, Edwards encountered Kotecki, but did not ask Kotecki any questions. He did inform Kotecki however, "it looks we are going to have to do it the hard way."

Before leaving the facility, Edwards testified that he reported to Franzo that he had been thrown out of the meeting. Franzo made no attempt to order the employees to talk to Edwards, or any other effort to alert employees that there was a potential problem with their alleged conduct.

The above description of the events of September 14, is based on a compilation of the credited testimony of Cerritelli, Stover, Kotecki, See, Edgerly, and Edwards, as well as an examination of Cerritelli's contemporaneous notes on the meetings written on the same day, and Edwards' memorandum to the file written on September 17. While much of the above findings are not is serious dispute, there is a significant issue as to how the meeting ended. In that regard, I have relied primarily on Cerritelli's notes, which were prepared on the same day of the events, which reflect that See did in fact, contrary to the testimony of several of the General Counsel's witnesses, state that because Edwards would not turn over his records, the question-and-answer period is over. While this finding is consistent with Edwards' testimony, I also conclude contrary to Edwards' assertion that Cerritelli did not state that he would refuse to answer questions, and that in fact consistent with Cerritelli's notes and corroborated by other witnesses, Cerritelli specifically told Edwards that he was willing to answer questions on his expenses, but "this is obviously a witch hunt."

On September 19, 1995, Cerritelli was informed by Franzo that two NAGE vice presidents (Bernard and Richard Gallo) wanted to see him. Cerritelli asked Kotecki to come into the office with him to be a witness. When they entered the office, Cerritelli informed the NAGE officials that the employees had a union, and said that if they wanted to have a meeting, he wanted union representation. He asked to be able to call See who would be able to be there shortly. Bernard replied that wouldn't be necessary and handed Cerritelli a letter of discharge signed by Lyons, dated September 19, "due to your submissions of fraudulent claims for reimbursements, as well as claiming and receiving monies for payment of gasoline for your automobile that was not used for work related matters." The letter also makes reference to the fact that Edwards had provided him with evidence (enclosed) which clearly indicated a "pattern of irregularities, receiving payment from the NAGE IBPO treasury by you." Cerritelli was also given a copy of a memo prepared by Edwards to Lyons, which detailed eight specific items of alleged improper conduct with regard to Cerritelli's expenses that Edwards had found. The memo also

[22] The "blue sheet" is the form submitted by the employee to substantiate his expense claims.

asserted that Cerritelli had refused to answer any of these matters when Edwards attempted to review them with him on September 14.

After reading both documents, Cerritelli asserted that the termination was motivated by antiunion animus and denied the assertion in Edwards' letter that he had refused to answer any questions about his expenses, and added that he was never asked any questions about his expenses. Cerritelli offered to answer any questions about his expenses and claimed that he was entitled to a hearing before being terminated. Bernard replied that the decision was final, and instructed Cerritelli to clean out his desk.

Later that same day, See and Edgerly arrived and See asked Bernard to reconsider Respondent's decision and allow Cerritelli to answer the accusations against him. Bernard replied that the decision is not going to be reconsidered. After further discussion, as Cerritelli and See were leaving, Cerritelli said to Bernard that he would see Bernard at the next negotiation meeting, which had been previously scheduled. Bernard replied that Cerritelli would not be allowed to attend any negotiation meetings, because he no longer worked for NAGE. See and Cerritelli responded that the Union has the right to designate whomever they chose as the union representative in negotiations.

Over the next several days Gallo and Bernard met with all of the Connecticut staff members individually and informed them that Cerritelli had been terminated for submitting fraudulent expenses. A number of the employees protested that Respondent was unfair, that Cerritelli would not cheat on his expenses, and or that Cerritelli had been terminated for his union activity. During the discussion with Stover, Bernard had informed Stover that Cerritelli had refused to answer questions about his expenses when the auditor asked about them. Stover replied that that was a lie, that he (Stover) was there and Cerritelli had stated to the auditor that he would answer any questions. Bernard answered that he (Bernard) wasn't there, and Stover responded, "no, you weren't there, I was."

Subsequent to the discharge of Cerritelli, Lyons received a number of letters from local officials of NAGE protesting Cerritelli's discharge, praising Cerritelli's performance as a representative, and/or requesting that Respondent reinstate him immediately. One such letter, dated October 10, 1995, which was signed by 7 union representatives and officers of a local with 600 members in Bridgeport, stated that "Cerritelli provided us with representation we had only dreamed of in the past."[23]

Edwards was Respondent's primary witness concerning the termination of Cerritelli. He furnished extensive testimony, as well as documentary evidence in support of Respondent's position, as well as testimony concerning his extensive experience and expertise in uncovering fraudulent expense claims.

Edwards is a CPA who was previously employed by the U.S. Department of Labor in various capacities wherein he spent years auditing labor unions for violations of the LMRDA as well as ERISA, and by the Internal Revenue Service, where he audited individual and business tax returns. He was hired by Respondent as an employee in 1988 where he remained until 1991 when he was removed from its payroll, but remained on retainer as an "outside accountant." In that capacity, he reports directly to Lyons, and spends 25 to 33 percent of his time performing services for Respondent, with the rest of his time devoted to his other clients. His duties for Respondent include preparation of annual financial statements, forms for Government agencies such as the IRS and the DOL, and the review of employee expense reports.

In connection with the latter responsibility, he reviews on a monthly basis the expense vouchers (blue sheets) submitted by Respondent's 80 employees nationwide. These blue sheets are submitted on a biweekly basis on Friday from the Union's local offices to Respondent's main office in Quincy, Massachusetts, where they are checked and reviewed by Cheryl Nealan the accounts payable clerk. After Nealan approves, she passes the forms on to Ron Gray the controller for further scrutiny. If Gray approves, the forms are given to Lyons for his signature.

Nealan, Gray, and Edwards when reviewing vouchers, look for anything unusual or as Edwards explained "reg flags." According to Edwards some of the "red flags" are xeroxed copies of receipts, larger than usual amounts, and round numbers on meal or gas receipts. Edwards further testified that he has trained Nealan to look for those unusual items as he described, and indicated that Nealan is very "knowledgeable, experienced" and has a "very good understanding" of what to look for in terms of "red flags" in the blue sheets.

Edwards conceded and the employees confirmed that Respondent has not issued any written guidelines or procedures with respect to details on how to fill out expense forms. Respondent also does not provide any training or instructions to its employees concerning these matters. The employees essentially learn how to do it from other employees, and when an error is found by Quincy they are instructed that they are doing something wrong.

The blue sheets themselves state only that employees "attach receipts." Respondent's rules and regulations contains the requirement that "all mileage expense submissions must have odometer readings on expense sheets." Additionally the individual employment agreements that Respondent compelled Fiorentino and others to sign states that employees "will be reimbursed in accordance with the Employer's policies in effect from time to time for traveling, entertainment, and other expenses reasonably incurred in the performance of duties and responsibilities."

While Edwards admits the lack of comprehensive guidelines by Respondent, he asserts that when he reviews expenses he follows the guidelines of the DOL and IRS, which according to Edwards, require the submission of "original receipts."[24]

In that connection Edwards conceded that occasionally the IRS will overlook the submission of an original receipt if a reasonable explanation is given, and that Respondent follows the same policy. According to Edwards, if an employee loses a receipt for a meal or gas, or forgets to obtain one, Respondent will allow the reimbursement if the employees provides a written explanation of same on the blue sheet. While Edwards admitted that Respondent has not set forth this policy in writing, he asserts that he has seen blue sheets with such explanations, and was told by Gray that this was Respondent's policy.

However, as noted Gray did not testify, and Respondent adduced no other testimony or evidence such as any blue sheet

[23] Another letter from another local union, went so far as to threaten to look for new representation if Cerritelli is not reinstated.

[24] However Edwards did not cite nor did Respondent introduce evidence of any specific IRS or DOL rule or regulation requiring the submission of "original" receipts.

filled out in this manner, that would corroborate Edwards' assertion of Respondent's alleged policy with regard to missing receipts. Moreover, the record included a complete set of vouchers for the Connecticut area director for the fiscal year 1994–1995 and they contain no examples of instances in which this "alleged" policy was followed.

In view of the lack of published guidelines, as well as the lack of training with regard to expense vouchers, it is not surprising that employees would make errors on their expense reports. The record reflects that Respondent's uniform policy concerning problems with expense vouchers prior to 1995 was for someone in Quincy to immediately call the employee when an error is uncovered, ask for an explanation from the employee, and/or inform the employee that the particular reimbursement request was improper. Fiorentino, Kotecki, Stover, as well as Cerritelli himself testified to a number of such instances, including at times phone calls directly from Lyons to himself, to Cerritelli concerning his expense report.

For example in August 1994, Cerritelli received a call from Gray questioning some gas bills that he had recently submitted that were larger than normal. Cerritelli explained to Gray that the vehicle that he normally used for union business was in the shop for repairs, and he was forced to use his pickup truck during this period. Cerritelli informed Gray that if there was a problem with that, Respondent should not pay the bill. Gray declined Cerritelli's offer and Respondent paid the voucher that included these gas purchases.

The record also reflects that on occasion Respondent will send a memo to employees concerning reimbursement issues. For example, on September 22, 1993, Lyons sent such a memo to all of Respondent's employees concerning telephone reimbursement expenses, requiring a detailed listing identifying the business calls, and reminding employees that reimbursement is limited to business and not personal calls.

Edwards also testified that when in his review of the vouchers, he discovers some questionable items, he will review the vouchers of that employee for a year or two to determine if he sees a suspicious pattern. If so, Edwards further asserts that he will direct his bookkeeper to enter data from the vouchers onto a computer which can be arranged in a variety of different ways in order to discover patterns of misconduct. That will often lead him to conduct a further analysis of the actual receipts, and if he finds a pattern of improper conduct he reports it to Lyons. Edwards testified that on eight previous occasions, involving employees at various of Respondent's locations,[25] he uncovered improper conduct in that way, and reported his findings to Lyons. In each instance, according to Edwards, he asked the offending individuals for an explanation for his findings, they were unable to supply adequate explanations, and all eight of these individuals were eventually terminated by Lyons.

Edwards' unrebutted testimony with respect to these situations is credited. Thus in 1990, Edwards while reviewing the vouchers of James Flemming, an employee in Respondent's Hampton, Virginia office, noticed that he had altered airline tickets by whiting out someone else's name, putting his own name on the ticket, and requesting reimbursement from Respondent for trips he had not taken valued at a few thousand dollars.

[25] None of these past instances involved employees at either of Respondent's Connecticut facilities.

Also in 1990, Roger Wormington an employee in Respondent's Missouri office was also terminated. In that case Edwards discovered that he was submitting vouchers for hotel rooms near his hometown which led Edwards to conclude that Wormington was not traveling on NAGE business during his stays at these hotels. However, Edwards admitted that there were also allegations that Wormington was using the hotel for immoral purposes, and that his termination was based primarily on "morals," although the expenses were also a factor in his view.[26]

Bonnie Brown was Respondent's director at its California office. In 1993, Respondent received a complaint from an employee at that office that Brown was in the process of driving to Michigan while she was supposed to be working. Lyons directed Edwards and Treasurer Joe Delorey to go out to California and investigate that allegation. Edwards had previously "red flagged" her expenses but had not done anything about it. When he arrived in California, he opened up Brown's desk and discovered a stack of blank stubs from two or three restaurants, that he concluded she had been using to submit claims for meals. Edwards had found previously from 6 to 12 receipts from Brown in her vouchers that appeared to be from the same receipts in sequence. Brown was terminated for the problems with the receipts that Edwards discovered, as well as the fact that he also confirmed that Brown was in Michigan while still collecting pay from Respondent without having taken leave.

Nancy Tidwell also worked at the same California office as Brown, and in fact traveled with Brown "all the time." While investigating Brown, Edwards also discovered in Tidwell's desk the stack of blank receipts that Brown had in her desk. Tidwell was also terminated.

Judith McCord was employed at Respondent's California office. Cheryl Nealan had discovered that McCord had personally cashed an expense check from NAGE for payment of books, and then placed another order for the books. Edwards went out to California, confronted her with the check that she had endorsed to herself, she had no explanation and was fired.

Dennis Anderson worked for Respondent in Quincy. Edwards discovered that he turned in 96 sequential receipts over a period of 4 years. Some of the receipts had amounts mechanically imprinted, but Edwards found out that Anderson had a girlfriend who was a waitress. Additionally Edwards believed that Anderson was submitting excess gas purchase claims, although he states that "I never proved that." Anderson was also confronted with Edwards' accusations, had no explanation and was terminated.

Joseph Esquival, an employee in the San Antonio, Texas office was terminated by letter dated October 18, 1995, for filing false claims on his expense sheets. Edwards had uncovered problems with Esquival's expenses by reviewing vouchers, and concluded that he was using sequential receipts and turning in receipts which were not accurate. Edwards went to San Antonio, asked Esquival for an explanation, he had none and was ultimately terminated by Lyons. The discharge letter reflects that some slips that Esquival submitted were "whited" out and dates were changed. Esquival had also submitted a substantial

[26] Since Edwards did not make the decision to terminate Wormington, he was not sure whether the problem of the expenses alone would have been sufficient for discharge. Edwards did admit however that "he was more fired for his morals."

number of sequential receipts, similar to the magnitude of Anderson.

Finally, Kenneth Cram at Respondent's California office was caught and fired by the director of that office, for obtaining reimbursement from Respondent for hotel bills, and failing to pay the hotel, and for using credit cards of other employees for purchases. Thus he was fired for "stealing" from NAGE as well as from other employees. Edwards had no involvement in this termination.

Edwards testified that while conducting his normal review of vouchers in the summer of 1994, he noticed unusually large gas receipts of $35–$40 from Cerritelli. According to Edwards this was a "red flag," but he did nothing about it at the time. He admitted on cross-examination that he notified Gray of what he discovered, but that "he was sure" that Gray did not contact Cerritelli about the matter, or take any other action concerning his discovery. However when I asked Edwards about this issue, he conceded that he did not know if Gray spoke to Cerritelli about the matter.

In fact, as I have detailed above, Gray did, in accord with Respondent's normal practice, question Cerritelli about his large gas purchases in August 1994, was satisfied with Cerritelli's explanation that he was forced to use his pickup truck during this period of time, and the vouchers were paid.[27]

According to Edwards, in late December 1994, he again noticed additional large purchases of gasoline on Cerritelli's vouchers. He asserts that he therefore decided to put Cerritelli's expense reports on the computer. Edwards claims that when he examines an employee's expenses on the computer, he normally will include other employees in that office to see if there was some conspiracy in the office in submitting phony receipts. Therefore according to Edwards, sometime in January 1995, he caused the expense reports of Cerritelli, Stover, and Wenograd to be inputted into the computer and the data was formatted in different orders.

Edwards did not specify which particular gas purchases of Cerritelli caught his attention in December 1994. However, subsequent computer printouts (to be discussed more fully below) identified 13 large gas purchases for Cerritelli, which Edwards asserted he believed were excessive, i.e., those in excess of $35. These purchases included seven between July 28 and September 2, 1994, which covered the period of time that Cerritelli was using his pickup truck, and which had already been satisfactorily explained to Gray. Of the other six, one occurred in 1993, one in early 1994, and two in 1995. Significantly, none of these purchases occurred between September and December 1994, so it is unclear what gas purchases of Cerritelli had "caught" Edwards' eye when he allegedly decided in December 1994 to input Cerritelli's vouchers onto the computer.

Edwards testified that he examined the vouchers of all Connecticut employees, and selected other employees to include in the computer, employees whose vouchers were similar to Cerritelli. While it is clear that Stover's vouchers would fit that description, Wenograd was an attorney rather than a representative who was reimbursed for travel on a mileage basis and did not submit gas receipts. He also had very few meal reimbursement requests on his vouchers. Edwards, when asked on cross-examination why he selected Wenograd, rather than other employees such as Pettinicchi or Franzo who had more similar vouchers to Cerritelli for review, finally responded that, "I can't explain."

In fact the blue sheets of Pettinicchi and Franzo were more similar to Cerritelli's, and they also contained several prominent "red flags," as defined by Edwards. Thus Pettinicchi routinely submitted mileage claims in round numbers ending in zero. Additionally he constantly failed to follow Respondent's written requirement of submitting odometer readings with mileage claims. Franzo, whose vouchers are most similar to Cerritelli's, routinely submitted gas receipts with dates that did not match the dates on the voucher. Edwards testified that he had looked at the vouchers of Franzo and Pettinicchi (as well as others), and admitted that these were problems that should have caught his eye, but that he simply did not notice them in his review. At one point when asked absent the failure to notice problems with Franzo's vouchers, asserted that since Franzo was a boss, he "may" have dismissed him right away, because he was the boss. Edwards then conceded that although Franzo was a "boss," he was subject to the same DOL requirements as employees, and added that he didn't recognize the discrepancies in Franzo's vouchers, and that "I'm very interested in looking at it."

In any event, when Edwards received the printouts of the vouchers for Stover, Winograd, and Cerritelli in late January 1995,[28] he testified that he reviewed them closely, and discovered what he viewed as suspicious entries. They were instances of sequential receipts for meals submitted by Cerritelli and Stover. Cerritelli submitted receipts for meals incurred allegedly on July 13, 1994, with receipt #11617 and for May 11, 1994, with receipt #11618. Since these two receipts were in sequential order, and the dates of the meals were in reverse, this indicated possible wrongdoing. Similarly, Edwards found that Cerritelli submitted receipt #12825 and #12828 (which were close together) for meals, and which also raised suspicions. He also found one similar suspicious instance of sequential receipts submitted by Stover, but "since the ink" was different on these receipts he decided to give Stover the benefit of the doubt so he let that go.

However, Edwards asserts that he did bring to Lyons' attention the two instances of sequential receipts that he found submitted by Cerritelli, and told Lyons that in his view there was a "potential" for fraud here, but the evidence was not sufficient to discipline anyone. Thus he allegedly recommended and Lyons agreed that no action be taken at that time and that Cerritelli's vouchers be monitored in the future. Edwards explained that he did not confront Cerritelli with these questions at that time, because if Cerritelli as Edwards suspected, was doing something illegally he would find another way to do it and Edwards did not want to give Cerritelli the opportunity to "change his method of stealing." Apparently Edwards said nothing to Lyons about the large gasoline purchases of Cerritelli, which allegedly had precipitated his decision to place Cerritelli's records onto the computer.

[27] In addition to the fact that Gray did not testify to refute Cerritelli's uncontradicted testimony about this call, I also rely in making this finding on Chandler's testimony that she recalls Cerritelli receiving a phone call from Gray about large gas purchases, and that Cerritelli was using his truck at the time for NAGE business.

[28] While Edwards was uncertain of the precise date that he received the printouts, since the last entry was January 5, 1995, and there is at least a 2-week delay for the vouchers to be processed in Quincy, it appears that it was not until late January when Edwards received these documents.

Edwards further testified that due to the intervening tax season, he was very busy, so he had no opportunity to review vouchers until August 1995. At that time Edwards updated the expense vouchers of Cerritelli, Stover, and Wenograd from January through August onto the computer. Edwards did not explain why he continued to input the vouchers of Wenograd and Stover into the computer at that time, since the prior printout had discovered no questionable entries for Wenograd, and only one questionable item for Stover, which Edwards had discounted, and had not even mentioned to Lyons.

On reviewing these printouts, Edwards discovered a number of additional questionable items from Cerritelli's vouchers, which led Edwards to examine the actual receipts and expense reports of Cerritelli. As a result of this review, in early September, he testified to a number of what he considered significant problems with Cerritelli's receipts. He also found one additional problem with Stover's vouchers.

Edwards then asserts that he shared his findings with Lyons, and they agreed that he should go to Connecticut and question Stover and Cerritelli personally about these discrepancies. It was also decided to talk to Kotecki in order to determine his understanding of Respondent's reimbursement policies, and to find out if there was "any sort of major misunderstanding" among Respondent's employees about these matters.

I have already detailed above my findings as to the events at the purported "audit" of September 14. After Edwards left the Cromwell facility he testified that he called Lyons on the phone and reported what had happened. According to Edwards, Lyons was quite agitated, and "may have indicated that he was going to fire Cerritelli."

Edwards wrote a memo to Lyons detailing his findings with respect to Cerritelli, dated September 18. The memo reads as follows:

> September 18, 1995
> RE: Review of Expense Vouchers
>
> Dear Ken:
>
> I have been conducting a review of the expense vouchers of the NAGE employees working in the Connecticut office for about one year. During this time I have identified one employee that is submitting expense vouchers on which he has charged expenses which appear to be non union related or on which I have questions concerning the validity of the receipts submitted.
>
> I attempted to review each of my findings with the employee involved, Robert Cerritelli, on September 14, 1995. He refused to answer any questions. Let me review my findings, as of this date, with you.
>
> 1. Four receipts have been submitted for meals purchased.
>
> The serial numbers on the receipts are 12825, 12826, 12827, and 12828. No other receipts of this style have been submitted in the past two years. The dates on the receipts (in the same order as above) are 11/30/94, 1/23/95, 1/17/95, and 12/8/94. The receipts all contain similar handwriting and are completed in a similar manner.
>
> Cerritelli's location on the evenings in question according to his expense sheet are Bloomfield, Canton, Winsted, and Winsted. The receipts appear to have come from a receipt book which can be easily purchased at a stationary store.
>
> 2. Two receipts for meals appear to be identical. The serial numbers are 11617 and 11618. They appear to have come from the same restaurant. The dates on the slips are 5/11/94 and 7/13/94. Cerritelli's location on those evenings, according to his expense sheets, was Farmington and Rocky Hill. The two receipts may have come from the same restaurant, on the same day.
>
> 3. Similar to the above there are two checks submitted by William Stover and Cerritelli, which appear to be identical. The serial numbers are 80416 and 80417. They are for meals in Canton and Bridgeport.
>
> 4. Cerritelli has submitted two photocopies of receipts for gas purchased at a Sunoco station in Prospect, CT. When originals of receipts from the gas station were submitted they included the date purchased. The two photocopies submitted did not contain the preprinted date on the form. On one form the date was written in, on the other there was no date. Cerritelli has apparently taken extraordinary steps to conceal the date the gas was purchased. This suggests to me the gas was purchased on a weekend or other non-workday.
>
> 5. Similar to the above Cerritelli has submitted a receipt from Cromwell Shell with the date torn off. This again suggests that the actual date purchased is being concealed.
>
> 6. Cerritelli has submitted several receipts for gas purchased at a Mobil station in Bethlehem, CT. He lives in Bethlehem. All receipts are original except one. He submitted a photocopy of a receipt from the station for gas purchased on 4/7/95. The photocopy has had one preprinted item on it removed. That is the time purchased. The day of the week was Friday, the gas was purchased in his hometown, the only reason I can see for removing the time would be because it was during work hours.
>
> 7. In the two year period reviewed Cerritelli purchased approximately 50% of his gasoline on a Friday or Monday. On 27 of the 104 weekends he purchased gasoline on both Friday and Monday. There is a possibility that NAGE is paying for his personal gas.
>
> 8. Cerritelli submitted travel vouchers for reimbursement for two telephone calls made to the UAW. The calls were made during work hours. NAGE did not pay Cerritelli for the telephone bills in question.
>
> Again I attempted to review these matters with Cerritelli but he refused to answer any questions on 9/14/95.
>
> Sincerely,
>
> Gary A. Edwards

Numbers 1 through 3 all relate to a similar contention by Edwards. In his view, these items established fraudulent conduct on the part of Cerritelli since they involved the use of sequential receipts with similar handwriting, and with amounts in round numbers, and from different locations. According to Edwards this suggests to him that Cerritelli had not in fact eaten these meals as he claimed. Edwards was adamant that original receipts must be submitted from the restaurant in which the meal was eaten. As noted, he claims that if a receipt is lost or not obtained, a written explanation must be included on the

voucher.[29] Edwards also conceded that at times, a restaurant will not write in the amount of the bill on the receipt. According to Edwards, it is not fraud for the employee to write in the amount on the receipt, as long as the receipt comes from the restaurant where the meal was consumed.

Cerritelli testified concerning these accusations. Generally he testified that there were some occasions where he would submit a receipt for reimbursement from a different restaurant where he had lost or failed to obtain a receipt. As long as he in fact ate the meal while on NAGE business, he testified that he believed that he could submit the receipt from another restaurant. Stover corroborated Cerritelli that he too at times would submit a receipt from another restaurant where he had forgotten to obtain the receipt from the restaurant where the meal was consumed. He also confirms that no one from Respondent ever informed him that this practice was improper. In this connection, I note that Respondent does not require the employee to write down the name of the restaurant on his vouchers.

Stover further testified that he never discussed this practice of turning in receipts from a different restaurant with any other employee, including Cerritelli. However, Stover asserted that he used to work for another Union, and there he was specifically told if he lost a receipt, to simply submit another receipt. Therefore he assumed that since he had done it at that job, it would be all right here as well, as long as he in fact incurred the expense on NAGE business.

Cerritelli examined the documents and blue sheets submitted by Respondent with respect to Edwards' memo. He testified that the four receipts described in item 1, all come from the same restaurant, Theo's, a small mom and pop restaurant in his hometown in Bethlehem, where he frequently eats on his way home after working late. He added that on these occasions, he had worked late on union business, ate the meals at Theo's and submitted the receipts. He had obtained from the restaurant a batch of receipts when he complained to the owner about not getting receipts. Thus, thereafter he used these receipts for the meals that he incurred on different days as reflected in Edwards' memo.

With respect to item #2 in Edwards' memo, Cerritelli did confirm by examining his sheets that he had worked in the evenings on these days, but he could not tell where he had obtained the receipts from or whether either one of them were from the restaurant where he had eaten on those nights. He did assert that he believed that both of these meals were actually consumed at an Italian restaurant in Burlington, Connecticut, where he frequently stopped on his way home from Farmington or Rocky Hill.

Item #3 refers to the two receipts submitted by Stover and Cerritelli which appear to be from the same restaurant, and for different dates in different cities. It is not exactly clear what Edwards was asserting with respect to this item, other than the receipts may have come from the same restaurant on the same day, and or there was some sort of collusion between Stover and Cerritelli. Edwards furnished no explanation as to why he attributed fraudulent conduct to Cerritelli with respect to this item, rather than Stover. In any event Cerritelli testified that he did recall having a meal in Canton, but he could not tell whether the receipt that he submitted was from the same restaurant where he had eaten the meal on that night.

[29] As related above however, no evidence was presented that employees were ever made aware of this procedure.

Item # 4 in Edwards memo refers to the fact that Cerritelli submitted two photocopies of gas receipts both of which had the date missing. According to Edwards, anytime xeroxed receipts are turned in, this is a "red flag" to him, since a "normal person would just put in the actual receipts." He adds that he has trained Nealan to look out for xeroxed receipts as one of the unusual things to look out for. No explanations was provided as to why Nealan had not noticed these xeroxed forms and had authorized the payment for these expenses without any questions.

Edwards further asserted, corroborated by the documents themselves, that other receipts from this particular gas station in Prospect, Connecticut, included the date. The two xeroxed forms did not contain a preprinted date, one of them contained no date at all, and the other had a date of February 2, 1995, written in. Edwards asserts that the failure to include the preprinted date on these xeroxed receipts indicates to him that the gas was purchased on a weekend or other nonworkday.

Cerritelli explained that he occasionally will submit a xerox copy of a receipt where he has written down a phone number or some other information on the back of the original. He had no explanation for why the date had not appeared on the copy. He wrote in the date on one copy, but simply forgot about filling it in on the other receipt. Cerritelli further testified that he frequently worked on weekends, and Respondents' own records indicate that he submitted receipts dated on Saturdays or Sundays, so it is questionable why he would try to conceal the date on these particular receipts.

The next item addressed by Edwards refers to a similar allegation, that a receipt was submitted for a gas purchase at a Shell station with the date apparently torn off, which Edwards again asserts suggests that Cerritelli was attempting to conceal the date. With regard to this allegation, Cerritelli testified that this gas station utilizes a self-service pump which generates receipts from the pump directly, and that at times part of the receipt has gotten mangled when he tears it off. Thus he believed that is what happened in this case, although he could not recall for sure.

The next item Edwards mentioned related to receipts from a gas station in Bethlehem, Connecticut. Here Cerritelli submitted a xerox copy of a gas receipt with a date April 7, 1995, but with the time missing. Other original receipts from this same station revealed that the time is normally printed therein directly under the date. Edwards testified that he believed from his review of these documents after ascertaining that April 7, 1995, was a Friday, that Cerritelli was concealing the time that he was in his hometown.

Cerritelli denied deliberately concealing the time, and explained again that he submitted a copy because he had used the original as scrap paper. He also asserted that since he regularly works nights and weekends, and is a salaried employee, he would have no reason to conceal that he was in his hometown during the hours of 9–9:30 p.m. Moreover he also passes through his hometown on his way to other towns that he services.

Item #7 refers to the fact that in the 2-year period reviewed, Cerritelli purchased 50 percent of his gasoline on Monday or Friday, and on 27 of 104 weekends, purchased gas on both Friday and Monday. Edwards asserts that this evidence raises "the possibility that NAGE is paying for his personal gas."

Cerritelli explained that he was never told that he could not buy gas on Friday or Mondays, and that he frequently worked

on weekends. Thus he asserted that he could have purchased gas on a Friday morning, conducted NAGE business all day Friday, conducted NAGE business over the weekend and/or on Monday, and bought gas again on Monday night. Although Cerritelli's appointment calendar was made available to Respondent, it did not ask him any questions about weekend work reflected in the calendar, or introduce any documentary evidence to contradict his testimony concerning weekend work.

The final item in Edwards' letter cites Cerritelli for submitting vouchers for reimbursement for two telephone calls made to the UAW during working hours. Cerritelli testified that these calls were made from his cellular phone, and under Respondent's practice he would submit the entire phone bill, cross out his personal calls, and deduct those amounts, and submit a figure for NAGE calls. Cerritelli admits that on this bill, he forgot to cross out two calls made to the Union. However, not only did Respondent fail to pay for these two calls, they failed to pay the entire bill, even for business-related calls that Respondent never questioned.

Perhaps not surprisingly, Respondent did not ask Edwards any questions about this item, nor did it offer any explanation as to why it refused to pay for the entire bill.[30] What is most revealing about this incident is how Edwards recognized the UAW telephone number. Edwards testified that he had no knowledge at any time about any union activities of Cerritelli or any particular individual. He admits that he heard in late 1994 about the fact that the UAW was organizing Respondent's employees, but denies knowing who was active on behalf of the Union, or who attended the National Labor Relations Board hearing on behalf of the Union.

Edwards admitted that the reason he was able to spot the UAW phone number was that Ron Gray had given the number to him, and instructed him to look for the UAW phone number on Cerritelli's phone bills. Gray as noted did not testify, so no evidence was adduced as to why he had instructed Edwards to monitor only Cerritelli's phone bills for scrutiny with respect to the UAW phone number.

After giving his memo to Lyons, Edwards testified that he told Lyons that he thought Cerritelli was perpetrating a fraud on NAGE. At that point Lyons called in Bernard, who also read the memo. Edwards made no recommendation whether or not to discipline Cerritelli, according to both Edwards and Bernard. Bernard testified that after Edwards showed him some of the sequential receipts, gas receipts that had been whited out, and gas fill ups on Friday and Monday, he recommended to Lyons that Cerritelli be discharged and Lyons agreed.

According to Bernard, two main problems really bothered him and motivated his recommendation. The gas receipts being whited out, and the sequential meal receipts indicated to him that this was "not an individual that we want working for NAGE."

B. Analysis

The evidence discloses a strong prima facie case that Respondent's decision to audit its employees on September 14, and its resultant discharge of Cerritelli were motivated by protected conduct. It is clear that Cerritelli and Stover were the leaders of the organizing campaign, testified on behalf of the Union at the representation hearing, and acted as observers for the Union at the election. Moreover Cerritelli was selected as shop chair for the UAW, represented employee Fiorentino in her dispute with management over signing an individual employment contract, was a member of the Union's bargaining committee, and was chief spokesperson for the Union at the first bargaining session between the parties on September 11.

Respondent argues that knowledge of such union activity has not been established, since Edwards and Bernard "credibly" testified that while they were aware of the Union's organizational activity they had no specific knowledge of any particular involvement or role of Cerritelli or any other employee.

Initially I note that such knowledge is automatically imputed to Respondent, since its representatives were aware of the employees actions in testifying at the hearing, acting as observer, and participating in negotiations, regardless of the particular knowledge of Edwards or Bernard. Moreover, I do not find that either Bernard or Edwards testified "credibly" as to their lack of knowledge of the union activity of the employees. Since it cannot be seriously disputed that Lyons was aware of the union activities of Cerritelli and Stover,[31] I conclude that since both Bernard and Edwards were close to and reported directly to Lyons, that he must have and in fact did inform them about the union activities of these employees. Once more the failure of Lyons to testify and deny that he so informed them of such facts, permits the adverse inference that I draw, that he did so.

Additionally, it is noted that Edwards admits that he was specifically directed by Gray to monitor Cerritelli's phone bills for calls to the UAW. Bernard was also aware of this accusation against Cerritelli, since Edwards' memo made specific reference to calls made by Cerritelli to the Union. Thus, since it is obvious that Cerritelli would not be making calls to the Union on his cell phone unless he were a union activist, Edwards and Bernard were not being candid when they denied knowing whether Cerritelli was a union supporter.

The record also discloses substantial evidence of animus, emanating primarily from Lyons, Respondent's president and the decision maker in Cerritelli's termination. Lyons sent the letters unlawfully threatening employees with layoff, while further displaying hostility to the Union by grudgingly announcing, "it appears that there will be an election." Lyons also sent another letter unlawfully threatening employees for engaging in strike activity. Additionally Respondent exhibited an attitude of refusing to accept the verdict of the election, by blatantly violating the Act when it required Fiorentino, to sign an individual employment contract dealing with terms and conditions of employment that should have been negotiated with the Union, or face termination. Similarly, Lyons announced a "new" bonus plan without notifying the Union, while repeating his statement found to be unlawful in his prior letter that Respondent employed too many attorneys in the Connecticut offices.

The timing of the audit and the consequent discharge is most suspicious since they both occurred within days of the first negotiation session, during which Cerritelli acted as the chief spokesperson for the UAW. I find it significant in this regard, that when Respondent notified Cerritelli of the discharge decision, Bernard informed Cerritelli that he would no longer be permitted to act as a negotiator for the UAW. This statement is

[30] Indeed, Respondent also convenently totally ignores this allegation in its brief, and makes no assertion in the brief that this conduct of Cerritelli was improper.

[31] I note again the absence of Lyons' testimony, which gives rise to an adverse inference that Lyons was so aware.

further evidence of discriminatory motivation by Respondent, since it suggests that a motivating factor in its decision was not only to retaliate against Cerritelli for his union activities, but also to deprive the UAW of its chief negotiator among the employees. This factor is not diminished by the fact that ultimately, Respondent after Cerritelli and See insisted correctly that the Union had a right to select its own negotiators, allowed Cerritelli to continue his participation. Obviously, Respondent must have subsequent to Bernard's statement consulted legal counsel, and found out that Respondent could not lawfully bar Cerritelli form negotiations whether or not he was an employee of Respondent. However, it appears that Lyons and/or Bernard had neglected to consult with counsel before Bernard made his statement, which I find to be reflective of Respondent's unlawful motivation in dealing with Cerritelli.

Accordingly, based on the foregoing, the General Counsel has adduced substantial evidence that a motivating factor in Respondent's decision to audit its employees and consequently discharge Cerritelli was protected union activities of Respondent's employees.

Therefore, the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same action absent the employees' protected conduct. *Wright Line, Inc*., 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

In that connection, Respondent argues that it has met its burden of proof through the testimony of Edwards and Bernard, coupled with documentary evidence that it submitted. According to Respondent, it has established that Respondent terminated Cerritelli because he submitted fraudulent expense vouchers, and argues that in order to rebut the General Counsel's prima facie case, it need only show that it "reasonably believed" that Cerritelli engaged in misconduct warranting termination. *GHR Energy Co*., 294 NLRB 1011, 1012–1013 enfd. 924 F.2d 1055 (5th Cir. 1991); *Jordan Marsh Stores Corp*., 317 NLRB 460, 476 (1995).

While I agree in part with Respondent's assessment of the appropriate legal standard, I cannot agree that it has adduced sufficiently credible evidence to meet its burden of proof that it would have terminated Cerritelli or audited the employees absent their protected conduct.

I do agree with Respondent that it need not establish that Cerritelli committed fraud, in order to sustain its burden of proof,[32] and that it need only show that it had a reasonable belief that he committed fraud, and that it would have acted on that reasonable belief the same way regardless of protected conduct of its employees.

There are several problems with the evidence presented by Respondent in its attempt to meet its burden in this regard, the most prominent of which is the absence of any testimony from Lyons. In the circumstances of this case, where Lyons was the decision maker in all of Respondent's actions, it was he who committed most of the 8(a)(1) violations found, and where the question of Respondent's "reasonable belief" that Cerritelli committed fraud is crucial to a determination of the validity of Respondent's defense, the unexplained absence of Lyons' testimony is most damaging to, if not fatal to Respondent's ability to meet its *Wright Line* burden of proof.

[32] In my view Respondent has clearly not proven that Cerritelli actually committed fraud, as Respondent asserts.

Initially I note that the failure to call the decision maker to explain why he terminated Cerritelli, gives rise to an adverse inference, which I find it appropriate to draw, that his testimony if offered would not have been favorable to Respondent's case. *United Parcel Service Corp*., 321 NLRB 300 fn. 1, 308–309 fn. 21 (1996); *Reddy Mix Concrete Co*., 317 NLRB 1140, 1143 fn. 16 (1995); *Dorn's Transportation Co*., 168 NLRB 457, 460 (1967) enfd. in pertinent part 405 F.2d 706, 713 (2d Cir. 1969). See also *Kut Rate Kid & Shop Kwik*, 246 NLRB 107, 121 (1979) (ALJ affirmed by Board concluded that adverse inference was proper where the decision maker testified, but did not testify as to precise reasons for the discharges, and where terminations involved alleged theft by employees).

Even apart from an adverse inference, the question of reasonable belief of Respondent is so critical, the failure to call Lyons to testify as to the basis for his alleged reasonable belief, and to subject himself to cross-examination with respect to this issue cannot be overlooked. This omission is particular significant here, since the question of what items in Edwards' letter that Lyons allegedly relied in approving Bernard's termination recommendation, is not free from doubt. Thus Edwards referred to eight examples of allegedly fraudulent conduct by Cerritelli in his memo to Lyons. Bernard testified that the items that he relied on to convince him to recommend discharge were the sequential receipts and the "whiting out" on gas receipts. I note that Bernard made no mention of allegation number eight in Edwards" memo, accusing Cerritelli of submitting vouchers for reimbursement for phone calls made to the UAW during working hours. While Lyons' discharge letter made no specific mention of this accusation, it did assert that Cerritelli engaged in "financial irregularities," and attached Edwards' memo to him along with his letter to Cerritelli. This suggests that Cerritelli's calls to the Union were one of the factors in Lyons' decision.

Indeed, it is not surprising that Respondent totally ignored this allegation in its questioning and in its brief, since a finding that this item formed part of Respondent's alleged "reasonable belief" that Cerritelli committed fraud is most damaging to Respondent's case. Thus Respondent adduced no evidence that any employee had ever even been disciplined for making unauthorized phone calls, nor any evidence that it had any rule prohibiting personal phone calls during working hours. Therefore it does not seem relevant at all whether or not Cerritelli made the calls to the Union during working hours or not, since the alleged basis for the complaint was his seeking reimbursement for the calls. However, Edwards' reference to the fact that Cerritelli made calls during working hours to the Union, implies that Respondent was invoking a discriminatory rule of penalizing Cerritelli for making calls to the Union during working hours. Moreover, this allegation is also suggestive of the fact that Cerritelli was singled out for scrutiny because of his union activity. Therefore, the failure of Lyons to testify and explain his position and views on these issues further detracts from Respondent's defense, as does the simple fact that the absence of Lyons' testimony leaves the record devoid of any testimony that the decision maker would have terminated Cerritelli, or ordered Edwards to audit the employees, absent their protected conduct.

A second reason for concluding that Respondent has failed to meet its *Wright Line* burden is the application of the well-established principle that employee misconduct discovered during an investigation undertaken because of an employee's

protected activity, does not render the discharge lawful. *Kiddie, Inc*., 294 NLRB 840 fn. 1 (1989); *Advance Transportation Co*., 299 NLRB 900, 912 fn. 14 (1990); *Kut Rate Kid*, supra at 121; *Fixtures Mfg. Co*., 251 NLRB 728 (1980). The theory of this line cases precludes the Employer from asserting that it would have terminated the employee absent his protected conduct, since if the employer had not unlawfully undertaken to investigate the employee, it would not have had a basis for discharging him. Thus the failure to find a violation would permit an employer to act unlawfully and then avoid remedial measures merely because it learned something which under other circumstances might constitute cause for discharge. *Fixtures Mfg.*, supra.

As noted, I conclude that the above line of cases are applicable to the instant matter, as I do not find the testimony of Edwards credible that he discovered the alleged misconduct of Cerritelli, based on his purely "random" review of the expense records of Respondent's employees. In that connection, Respondent relies on the testimony of Edwards that he first discovered a potential problem with Cerritelli's gas expenses in August 1994, several months before any union activity began. While I do credit Edwards' testimony that he indeed noticed this possible problem at that time, I have found above that contrary to Edwards' testimony, that Respondent through Gray, consistent with its past practice, called Cerritelli and received a satisfactory explanation for the increased gas usage. This incident, rather than supporting Respondent's defense, provides substantial evidence that its investigation of Cerritelli as well as Stover and Wenograd commenced in January 1995 was discriminatorily motivated.

Edwards' testimony concerning his alleged reasons for placing the expense vouchers of these three employees into his computer at that time is filled with inconsistencies and implausible and uncertain explanations, and is far from convincing. Thus he asserts that in December 1994, on further random review of expense vouchers, he discovered that Cerritelli had again submitted excessively high gas receipts. He further testified that in order to determine whether other employees are conspiring to submit phony receipts, he as is his normal practice, selected other employees in the same office, and placed their expenses on the computer along with those of Cerritelli.

There are a number of significant problems with this unconvincing testimony. First, Edwards did not specify which alleged large gas purchases he "discovered" in December 1994 that allegedly motivated his decision to utilize the computer. Moreover, Respondent's own records reveal no excessively large, i.e., over $35 gas purchases of Cerritelli from September to December. Thus, the large gas purchases on Cerritelli's record were for the most part incurred in the summer of 1994, and had already been satisfactorily explained to Respondent. Additionally, even had Edwards discovered some large gas purchases in December 1994, no cogent explanation was given as to why Respondent did not follow its normal practice, which it had utilized in August 1994, and telephoned Cerritelli for an explanation. Edward's testified that since employees might conspire to submit phony receipts, he decided to monitor three employees' expenses. This testimony is totally implausible. He did not explain nor does the record indicate how employees can conspire to submit phony gas receipts. Indeed the only logical explanation in the record for why Respondent did not follow its own past practice of calling Cerritelli for an explanation in December 1994 is that the Union's organizing had begun.[33]

More significantly, Edwards' testimony as to why he selected Stover and Wenograd to monitor along with Cerritelli is similarly unconvincing. He asserts that he selected Stover and Wenograd because they submitted similar vouchers to Cerritelli. While that explanation is logical with respect to Stover, it is clearly not with respect to Wenograd. Wenograd is an attorney, a different position than Cerritelli, and more importantly was reimbursed on a different basis for mileage, and he rarely submitted requests for meal reimbursement.

On the other hand two other employees, who performed the same work as Cerritelli (and Stover), and whose vouchers were similar in nature, were not selected to be monitored, Pettinicchi, and Franzo. Significantly, the vouchers of Franzo and Pettinicchi revealed some of the same "red flags" such as round numbers, and xeroxed receipts, that allegedly troubled Edwards with respect to Cerritelli's vouchers.

Yet, Edwards did not select Franzo or Pettinicchi and did choose Wenograd. When Edwards was asked why he had selected Wenograd, particularly since his vouchers were so small, Edwards replied, "I can't explain." He could not explain because in my view the evidence is compelling that Wenograd was selected for monitoring, as were Cerritelli and Stover because of their activities and support for the Union. It cannot be construed as a mere coincidence that Stover, Cerritelli, and Wenograd were the only three employees of Respondent to testify at the representation hearing on behalf of the Union.

While it is true that the hearing did not take place until February 1, and Edwards entered the data on expenses into the computer in late January, I do not find this controlling. I conclude that it is likely that based on the small size of the office, as well as the failure of Lyons to testify, that Respondent knew or suspected that in January 1995, Cerritelli, Stover, and Wenograd were supporters of the UAW. This conclusion is fortified by Respondent's actions in August 1995 of continuing to monitor Wenograd's expenses by feeding data on his vouchers into the computer, along with that of Cerritelli and Stover. By August, the hearing had of course taken place, so Wenograd's union support was well known to Respondent. Yet it again monitored Wenograd's expenses, even though Edwards admitted that nothing suspicious had been revealed concerning Wenograd's vouchers from the January printouts, as had been discovered with respect to Cerritelli and Stover.

Accordingly, based on the foregoing, I find that Respondent's decision to monitor the expense reports of Cerritelli, Stover, and Wenograd in January and August[34] 1995, was discriminatorily motivated, and that any evidence of misconduct disclosed by the computer printouts and the subsequent investigation of the discrepancies disclosed therein cannot be used by Respondent to justify its discharge of Cerritelli. *Kidde*, supra; *Kut Rate*, supra; *Fixtures Mfg*., supra.

Finally, I conclude that Respondent's defense is substantially undermined by its failure to adequately investigate its purported

[33] Indeed, Edwards admitted that he was aware that the UAW was organizing in December 1994.

[34] I note that even if its found that the January investigation was not unlawfully motivated, the August monitoring in my view would still be unlawful. Thus by that time, the union activities of all three were well known, and Respondent has adduced no evidence of any justification for monitoring Wenograd's expenses in August, where the January review of his expenses revealed no evidence of wrongdoings.

suspicions that Cerritelli committed fraud, and its failure to afford him an opportunity to respond to the allegations against him. *Paper Mart*, 319 NLRB 9, 10 (1995); *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1996). Such conduct by Respondent lends support to an inference of unlawful motivation, and shows that Respondent was not truly interested in determining whether misconduct had actually occurred. *Handicabs, Inc*., 318 NLRB 890, 897 (1995); enfd. 95 F.3d 681, 685 (8th Cir. 1996); *W.W. Grainger v. NLRB*, 582 F.2d 1118, 1121 (7th Cir. 1978); *Clinton Foods 4 Less*, 288 NLRB 597, 598 (1988).

In that regard, although Respondent argues that Cerritelli was given an adequate opportunity to respond, and that he declined to answer any questions, at See's direction, I have not credited Edwards' testimony in that respect and found that to the contrary Cerritelli affirmatively offered to answer any questions that Edwards had for him concerning his expenses. While I have credited Edwards' testimony that See did state at that time that the meeting was over and there would be no more questions, Cerritelli's assertion that he would answer any questions came after See's statement. Moreover See had made a similar statement during the interview with Stover, and after a caucus the questioning resumed and Stover answered. Therefore based on the above, I conclude that Respondent was not interested in obtaining the truth about the allegations against Cerritelli, nor in obtaining his version of events, but rather was merely attempting to provide justification for its previously determined decision to terminate him. I note in that connection, that when Edwards notified Lyons of what had happened at the meeting, Lyons immediately informed Edwards that Cerritelli was going to be terminated, even before receiving Edwards' written report of Cerritelli's alleged misconduct, and before Bernard made his recommendation to Lyons that Cerritelli be discharged.

Furthermore, when Bernard notified Cerritelli about his discharge, Cerritelli immediately protested that contrary to Edwards' letter, he had not refused to answer questions about his expenses, and requested that Respondent give him that opportunity. Bernard denied him that chance, and even after Stover confirmed to Bernard that Cerritelli had specifically offered to answer any of Edwards' questions, Respondent still refused to reconsider its decision. Indeed there appears to have been no urgent need to terminate Cerritelli so rapidly, and it would not have caused any hardship to afford Cerritelli the opportunity that was denied him to provide his version of events.

Respondent's refusal to do so, particularly where it received several letters of praise for Cerritelli from local officials, which demanded or requested that he be reinstated, lends further support to my conclusion that Respondent was not interested in determining whether Cerritelli had an explanation for his conduct.

It is also noteworthy in this regard that according to Edwards' own testimony one of the purposes of the "audit" was to find out the employees' understanding of Respondent's expense policies. That suggests that Respondent believed, correctly as it turned out, that there may be some confusion in the employees minds as to what is appropriate conduct vis a vis expense vouchers. Thus, Edwards claims that Respondent's policy with respect to situations where an employee loses or fails to obtain a receipt, calls for employees to provide an explanation of this fact on their vouchers, and Respondent will pay the claim. However, admittedly Respondent never communicated this policy in writing to employees, and Respondent adduced no evidence or even another witness that employees were aware of such a policy.

Therefore, in the face of this confusion, as well as Respondent's failure to establish specific and clear rules as to the appropriate procedure for submitting expense vouchers, Respondent's failure to afford Cerritelli an opportunity to answer the allegations against him is even more suspicious, and indicative of discriminatory conduct by Respondent.

Respondent places significant reliance on the evidence established by Edwards, concerning the eight prior instances where Respondent terminated employees for engaging in allegedly similar conduct to that of Cerritelli. While such evidence that an Employer has terminated other employees for similar offenses to that of the discriminatee has been held to be important evidence in meeting an Employer's *Wright Line* burden, *Animal Humane Society*, 287 NLRB 50, 51 (1987); *Airborne Freight Corp.,* 728 F.2d 357, 358 (6th Cir. 1984), I do not find that Respondent's evidence in that regard can be so construed.

Initially, as I have concluded above, since the investigation of Cerritelli's conduct was unlawfully motivated, any evidence of misconduct discovered as a result of this unlawful investigation cannot form the basis for his discharge. Since all the evidence relied on by Respondent to terminate Cerritelli, emanated from this unlawful investigation, it does not matter how many employees in the past Respondent had terminated for similar reasons.

Moreover, an examination of the prior cases of termination, reveals them to be significantly different, both qualitatively and quantitatively from Cerritelli's situation. Thus most of the prior incidents involved clearly more serious transgressions than Cerritelli was accused of, such as altering airline tickets, receiving reimbursement for thousands of dollars of trips not taken, "immoral behavior," driving across country when the employee was supposed to be working, and depositing NAGE money in the employees personal account. While a few of the incidents cited did involve the submission of sequential receipts, they involved a much higher number of such submissions than Cerritelli.[35]

Further, in all the prior incidents of misconduct detailed by Respondent, unlike Cerritelli, the employee was given full opportunity by Edwards to provide an explanation for the allegations against them. Therefore, the past instances of misconduct where Respondent discharged eight other employees are insufficient to establish that Respondent would have terminated Cerritelli absent his protected conduct.

Accordingly based on the foregoing, Respondent has not met its *Wright Line* burden of proof and I conclude that Respondent has violated Section 8(a)(1) and (3) of the Act by terminating Cerritelli, as well as by auditing its employees.[36]

---

[35] Cerritelli submitted but 7 suspicious receipts, while the prior cases dealt with close to 100 sequential receipts.

[36] In that connection, the audit was part and parcel of its discriminatory scheme to terminate Cerritelli. I also rely on the fact that the "audit" of three employees, including Kotecki about whose expenses Respondent had found no irregularities, was unprecedented. Indeed although Edwards testified that he confronted the eight other employees with evidence of their misconduct, he did not testify that he "audited" any other employees at the same time.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its employees with layoff or discharge and by writing a letter of complaint to the Connecticut Statewide Grievance Committee, in retaliation for its employees activities on behalf of the Union and/or their protected concerted activity of engaging in a strike, Respondent has violated Section 8(a)(1) of the Act.

4. By discharging and refusing to reinstate its employee Robert Cerritelli, and by conducting an audit of its employees expenses, because of their activities on behalf or support for the Union, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. By bypassing the Union and dealing directly with employees with respect to terms and conditions of employment, including requiring employees to sign an individual employment agreement as a condition of their employment, and by unilaterally changing its bonus plan, its policies with respect to eating and drinking at their desks, and by its removal of work from the bargaining unit, without affording the Union an opportunity to bargain over these matters, Respondent has violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent disciminatorily discharged Robert Cerritelli, I shall recommend that Respondent offer him immediate and full reinstatement to his former job or a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him. All backpay provided shall be computed with interest on a quarterly basis in the manner prescribed by the Board in *F.W. Woolworth Co.,* 90 NLRB 289 (1950), and with interest computed in the manner and amount prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Isis Plumbing Co*., 138 NLRB 716 (1962).

Additionally, I shall recommend that Respondent expunge from its files any reference to the discharge of Cerritelli, and to notify him in writing that this has been done and that evidence of same will not be used as a basis for future personnel actions against him.

Since I have found that Respondent has violated Section 8(a)(1) and (5) of the Act by unilaterally changing its policies with respect to its bonus plan and the privilege of employees eating and drinking at their desks, I shall order that these changes be rescinded. I have also concluded that Respondent violated Section 8(a)(1) and (5) of the Act by its actions of assigning bargaining unit work to its newly designated supervisor Dominick Pettinicchi. To remedy this violation, it is appropriate to recommend that Respondent be ordered if requested by the Union to revoke and cease utilizing the classification of assistant director, and return to the unit employee Pettinicchi who was promoted into this classification. *Hampton House*, supra, 317 NLRB at 1006 fn. 7.

Finally it also appropriate to recommend that Respondent rescind and cease giving effect to any individual employment agreements that it required employees to sign in derogation of its obligation to bargain with the Union. Based on the foregoing findings of fact and conclusions, I issue the following recommended[37]

ORDER

The Respondent, National Association of Government Employees (International Brotherhood of Police Officers), a/w Service Employees International Union/NAGE/IBPO, Local 5000, Cromwell, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge or layoffs, or writing a letter of complaint to the Connecticut Statewide Grievance Committee, in retaliation for its employees activities on behalf or support for International Union, United Automobile, Aerospace, Agriculture & Implement Workers of America (UAW), Local 376 (the Union or the UAW) or in retaliation for engaging in a strike.

(b) Discharging, and thereafter refusing to reinstate its employees, or auditing the expense reports of its employees, because of their activities on behalf of/or support for the UAW.

(c) Refusing to bargain in good faith with the UAW, by bypassing the Union and bargaining directly with employees concerning their terms and conditions of employment, including compelling its employees to sign individual employment agreements with it as a condition of their employment.

(d) Refusing to bargain in good faith with the Union by unilaterally and without affording the Union an opportunity to bargain, changing its bonus plan for employees, revoking its policy of allowing employees to eat and drink at their desk, and by reclassifying employees as assistant directors and assigning them bargaining unit work.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Robert Cerritelli immediate and full reinstatement to his former job or, if this job no longer exists, to a substantially equivalent position without prejudice to the seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Expunge from its files any reference to the discharge of Robert Cerritelli and notify him in writing that this has been done and that evidence of the discharge will not be used as basis for any future action against him.

(c) On request, bargain with the UAW as the exclusive representative of its employees in the appropriate bargaining described below and, if an understanding is reached embody, the understanding in a signed agreement.

The unit is:

---

[37] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

All full-time and regular part-time attorneys, national representatives and secretaries employed by the Respondent at its Cromwell and Bridgeport, Connecticut facilities; but excluding all other employees, and guards and supervisors as defined in the Act.

(d) If requested by the UAW, revoke and cease utilizing the employee classification of assistant director, and return to the unit Dominick Pettinicchi who was promoted to this classification.

(e) Revoke and rescind the changes that it made in its bonus plan, and its policies with respect to allowing employees to eat and drink at their desk.

(f) Cease giving effect to and rescind any individual employment agreements executed by its employees as a condition of their employment.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its offices in Cromwell and Bridgeport, Connecticut, and its main office in Quincy, Massachusetts, copies of the attached notice marked "Appendix."[38] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 30, 1995.

(i) Within 21 days after service by the Region file with the Regional Director a sworn certification of responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our employees with discharge or layoff, or write a letter of complaint to the Connecticut State-wide Grievance Committee, in retaliation for our employees activities on behalf or support for International Union, United Automobile, Aerospace, Agriculture & Implement Workers of America (UAW) Local 376, or in retaliation for engaging in a strike.

WE WILL NOT discharge and thereafter refuse to reinstate our employees, or audit the expense reports of our employees, because of their activities on behalf of/or support for the UAW.

WE WILL NOT refuse to bargain in good faith with the UAW, by bypassing the Union and bargaining directly with our employees concerning their terms and conditions of employment, including compelling our employees to sign individual employment agreements with us as a condition of their employment.

WE WILL NOT refuse to bargain in good-faith with the Union by unilaterally and without affording the Union an opportunity to bargain, changing our bonus plan for employees, revoking our policy of allowing employees to eat and drink at their desk, or by reclassifying employees as assistant directors and assigning their bargaining unit work.

WE WILL NOT in any like or related manner interfere, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Robert Cerritelli immediate and full reinstatement to his former job or, if this job no longer exists, to a substantially equivalent position without prejudice to the seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, plus interest.

WE WILL expunge from our files any reference to the discharge of Robert Cerritelli and notify him in writing that this has been done and that evidence of the discharge will not be used as a basis for any future personnel actions against him.

WE WILL, on request, bargain with the UAW as the exclusive representative of our employees in the appropriate bargaining described below and, if an understanding is reached, embody the understanding in a signed agreement.

The unit is:

All full-time and regular part-time attorneys, national representatives and secretaries employed by us at our Cromwell and Bridgeport, Connecticut facilities; but excluding all other employees, and guards and supervisors as defined in the Act.

WE WILL, if requested by the UAW, revoke and cease utilizing the employee classification of assistant director, and return to the unit Dominick Pettinicchi who was promoted to this classification.

WE WILL revoke and rescind the changes that we made in our bonus plan, and our policies with respect to allowing employees to eat and drink at their desk.

WE WILL cease giving effect to and rescind any individual employment agreements executed by us with our employees as a condition of their employment.

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES (INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS), A/W SERVICE EMPLOYEES INTERNATIONAL UNION/NAGE/IBPO, LOCAL 5000

[38] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."